Supreme Court, U.S.
FILED
94 1664 APR 10 1995
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

APPENDIX

JOEL LEVINE
16000 Ventura Boulevard
Suite 500
Encino, CA 91436
(818) 995-6052

IRA M. SALZMAN
600 South Lake Avenue
Suite 410
Pasadena, CA 91106
(818) 578-0043

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
JOHN K. BUSH
JONATHAN K. TYCKO
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
** Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Stacey C. KOON, Defendant-Appellant, Cross-Appellee.

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Laurence M. POWELL, Defendant-Appellant, Cross-Appellee.

Nos. 93-50561, 93-50608, 93-50562 and 93-50609

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 2, 1994.

Decided Aug. 19, 1994.

Before: BROWNING and FLETCHER, Circuit Judges, and FITZGERALD,* District Judge.

FLETCHER, Circuit Judge:

Stacey Koon and Laurence Powell ("appellants") appeal their jury convictions for deprivation of rights under color of state law in violation of 18 U.S.C. § 242. The United States appeals Koon's and Powell's sentences under the Sentencing Guidelines. We affirm the convictions but remand for resentencing.

---

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

BACKGROUND

The arrest of Rodney King occurred in the early morning of March 3, 1991 in Los Angeles. After drinking malt liquor with two friends, King left a suburb of Los Angeles and began driving. At this time he was intoxicated. Officers Melanie Singer and Tim Singer, both California Highway Patrol ("CHP") officers, observed King's vehicle speeding on the 210 Freeway. The officers began to pursue the vehicle and called on the radio for help. Several Los Angeles Police Department ("LAPD") units joined in the pursuit. Among these units was one manned by Powell and his trainee, codefendant Timothy Wind. The pursuit ended when King pulled his car over at an entrance to the Hansen Dam Recreation Area on Osborne St.

The officers ordered King and the other occupants of the vehicle to get out of the vehicle and assume a felony prone position (*i.e.*, King was ordered to lie on his stomach with his arms behind his back, legs spread, heels turned away from the officers). King got out of the car but did not lie down. At this time Sergeant Koon arrived and took command. Police officers Ted Briseno and Roland Solano arrived soon after. The officers again ordered King to lie in a felony prone position.

King eventually got down on his hands and knees, but did not get into the felony prone position. Officers Powell, Wind, Briseno, and Solano attempted to place him in that position using a "team takedown" or "swarm." King became combative and the officers retreated. Koon then fired taser darts into King.

The events that occurred next were captured on videotape by George Holliday (the "Holliday videotape"). This videotape was the focus of much of the testimony at trial and is described in detail in the district court's sentencing opinion. *See United States v. Koon*, 833 F. Supp. 769, 774-80 (C.D. Cal. 1993). The following description of the events tracks the relevant time frames on the Holliday videotape.

As the videotape begins, it shows that King got to his feet in an attempt to escape. Powell and Wind began to strike King with their batons. At trial it was disputed whether Powell's first blow hit King in the head. The district court concluded that

Powell struck King's head accidentally. *Id.* at 777. King fell to the ground and attempted to rise. At 18 seconds, Briseno put his hand on Powell's baton, which Powell had raised as he stood above King.

From 18 to 30 seconds, King attempted to get up, and was struck with batons by Powell and Wind. From the 35th second to the 51st second, Powell struck King repeatedly. At approximately 43 seconds, one or more of Powell's baton blows fractured King's right leg. At 55 seconds, Powell struck King on the chest or upper abdomen. After this blow, King rolled onto his stomach and lay prone. At this point the officers suspended the use of force and stepped back for about ten seconds. Powell began to reach for his handcuffs. The district court found this movement to be evidence that Powell perceived King no longer to be a threat. *Id.*

At 1:05, Briseno moved forward and used his left foot to stomp King in his upper back or neck. King's body writhed in response. At 1:07 on the videotape, Powell and Wind began to strike King again with their batons. At approximately 1:29, King put his hands behind his neck and subsequently was handcuffed.

After King was handcuffed, Powell radioed for an ambulance. Powell sent two messages over the Mobile Digital Terminal to other officers that said "ooops" and "I havent [sic] beaten anyone this bad in a long time." Koon sent a message to the police station that said "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time."

King was taken to Pacifica Hospital, where he was treated for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. At the hospital, Powell learned that King worked at Dodger stadium, and said to him, "We played a little ball tonight, didn't we Rodney?" King said, "I don't know." Powell said, "You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs." King responded, "Yeah I guess so." Powell said, "Yes, we played a little ball and you lost and we won."

Koon, Powell, Wind, and Briseno were tried in state court in Simi Valley, California on charges of assault with a deadly weapon and excessive use of force by a police officer. At the trial, Koon, Wind, and Powell's defense was that the force used during the arrest of King was justified and was not excessive. In contrast, Briseno testified that excessive force was used but that he had tried to prevent its use. The four officers were acquitted on all charges except for one count against Powell on which the jury hung.

On August 4, 1992, a federal grand jury indicted the four officers. Count 1 of the federal indictment charged Powell, Wind and Briseno with willfully depriving King of his constitutional rights in violation of 18 U.S.C. § 242 and with aiding and abetting each other in violation of 18 U.S.C. § 2. Count 2 charged Koon with willfully permitting the other officers to unlawfully strike King and willfully failing to prevent the assault of King by officers in his presence, in violation of 18 U.S.C. § 242.

The case was tried to a jury commencing February 25, 1993. The jury verdicts were handed down on April 17, 1993. Officers Briseno and Wind were acquitted. Officer Powell and Sergeant Koon were found guilty of violating § 242. Koon and Powell were sentenced on August 4, 1993 to thirty months imprisonment and two years of supervised release. *See Koon*, 833 F. Supp. at 792. Appellants timely appealed their convictions and the government timely appealed the sentences. We have jurisdiction.

DISCUSSION

A. *Admission of Briseno's State Trial Testimony*

Before trial, the government moved to admit a videotape recording of codefendant Briseno's testimony in the state court proceeding. The videotape, which was ultimately played as part of the government's rebuttal case, was the subject of many motions in the district court, and continues to be the subject of various claims on appeal.

Briseno's testimony was highly damaging to Koon and Powell. He testified, among other things, (1) that Powell's first

blow hit King in the face--which was inconsistent with Powell's position at trial; (2) that Powell delivered a second series of much more forceful blows to King "from the shoulder up"; (3) that Briseno couldn't see or understand what justified the other officers' behavior; (4) that Briseno grabbed Powell's baton and told him to "get the hell off" King; (5) that Briseno yelled to Koon "what the fuck [is] going out here," but Koon did not respond; (6) that the officers continued to strike King with the baton when he was neither aggressive nor combative; and (7) that Briseno went to the police station after the incident intending to report the use of force.

At the state trial, Briseno was cross-examined by all three of his codefendants as well as the prosecutor, who spent part of his time trying to establish Briseno's own culpability. On both direct and cross-examination, Briseno stated repeatedly that he thought the other officers had acted wrongly. These statements of opinion were redacted from the videotape played at the federal trial.

On appeal, Koon and Powell contend that admission of the videotape violated their Confrontation Clause rights. They also argue that the videotape should not have been admitted as rebuttal evidence, and that it contained improper lay opinion evidence.

1. *Confrontation Clause Challenge*

"The Confrontation Clause promotes accuracy in the criminal process by ensuring that the trier of fact has a satisfactory basis for evaluating the truth of out-of-court statements." *Barker v. Morris*, 762 F.2d 1396, 1399 (9th Cir. 1985) (citations omitted). When a hearsay declarant is unavailable to testify at trial, his out-of-court statements may be admitted without violating the Confrontation Clause so long as those statements bear sufficient indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 182-83, 107 S.Ct. 2775, 2782-83, 97 L.Ed.2d 144 (1987). "[N]o independent inquiry into reliability is required" under the Confrontation Clause, however, when the out-of-court statements "fall within a firmly rooted hearsay exception." *Id.* at 183, 107 S.Ct. at 2782. Since Rule 804(b)(1) is a firmly rooted exception to the hearsay rule, *Mattox*

v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (discussing history of the exception); *United States v. Kelly*, 892 F.2d 255, 262 (3d Cir. 1990), our analysis focuses on whether the district court erred under Rule 804(b)(1) in admitting Briseno's former testimony.[1]

Under Rule 804(b)(1), testimony from another proceeding is not excluded by the hearsay rule if the declarant is unavailable,[2] and if "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Appellants argue that the Briseno videotape should not have been admitted because at the state trial they lacked sufficient opportunity to cross-examine Briseno. Appellants point out that in the state proceeding they did not have the benefit of various enhancements to the Holliday videotape which were available at the federal trial.[3]

---

[1] The parties debate whether, given this collapse of the constitutional analysis into the Rule 804(b)(1) analysis, the abuse of discretion standard which governs admission of Rule 804(b)(1) evidence should apply, *see United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984), or whether the court should review de novo those Rule 804(b)(1) cases in which a constitutional claim is raised. We need not decide the issue, however, because we conclude that appellants cannot prevail under either standard. *See United States v. Payne*, 944 F.2d 1458, 1468 n.9 (9th Cir. 1991).

[2] Appellants do not dispute that Briseno, who chose not to testify in the federal trial, was "unavailable."

[3] Three enhancements were used at the federal trial: (1) the "filtered audiotape," which filtered out helicopter noise and purportedly made audible certain commands by Koon as well as the sounds of a taser being activated just before King went down (prepared by the defense); and (2) the "zoom videotape," which blew up the frames showing Powell's first blow to King (prepared by the defense); and (3) the "registered videotape," which stabilized the video image (prepared by the government).

In the district court, in addition to arguing that the lack of these enhancements hampered their ability to cross-examine Briseno during the state proceeding, appellants argued that their motive for cross-examination was

[Footnote continued on next page]

We reject appellants' argument. Appellants had a full and fair opportunity to cross-examine Briseno in the state trial. Indeed, they do not argue that the state court in any way interfered with their ability to carry out an effective cross-examination. They instead claim that the absence of the enhancements to the videotape at the state trial amounts to a lack of opportunity. We disagree. The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine. *See Thomas v. Cardwell*, 625 F.2d 1375, 1386 n.34 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089, 101 S.Ct. 881, 66 L.Ed.2d 816 (1981). In *Thomas*, the prosecution introduced, at defendant's second trial, the testimony of a witness from defendant's first trial who had become unavailable. *Id.* at 1384. By the time of the second trial, the defendant claimed to have discovered evidence that this witness was schizophrenic. *Id.* at 1386 n.34. The *Thomas* court rejected the argument that the purported discovery of new evidence established defendant's lack of opportunity to cross-examine the witness at the first trial. After noting that there was no suggestion that the defendant's failure to discover the information was the prosecution's fault, the court explained that

> often information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, the lack of information does not make the opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant.

Id.

[Footnote continued from previous page]

different in the state than in the federal trial because in the federal trial the prosecution was required to show a higher level of intent.

Appellants have not pursued this latter argument on appeal.

Much the same applies here. Appellants did not lack the opportunity to cross-examine Briseno; they lacked only some of the tools which were later developed by the government or by appellants themselves, and which appellants argue would have allowed them to cross-examine Briseno to better effect. Appellants' failure to take full advantage of their opportunity to cross-examine in the first trial--by developing those tools earlier—cannot alter the fact that they *had* the opportunity. *See United States v. McClellan*, 868 F.2d 210, 215 (7th Cir. 1989) ("the emphasis in [the Rule 804(b)(1)] inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place"); *United States v. Salim*, 855 F.2d 944, 953-54 (2d Cir. 1988) (under Rule 804(b)(1), defendant is entitled to "'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'") (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (per curiam)) (emphasis in original).[4]

In addition to a full opportunity, Rule 804(b)(1) requires that appellants' motive in carrying out their state trial cross-examination of Briseno was similar to the motive they would have had in the later proceeding. We conclude easily that it was. The operative facts and legal issues in the state and federal trials were substantially similar, *see United States v. Salerno*, ___ U.S. ___, ___, 112 S.Ct. 2503, 2509, 120 L.Ed.2d 255 (1992) (Blackmun, J., concurring) ("'similar motive' does not mean 'identical motive'"), and appellants do not challenge the district court's finding to this effect. Appellants thus had every

[4] Appellants argue that the newly discovered information in *Thomas* pertained only to the credibility of the witness, whereas the newly developed enhancements here pertain to the crime itself. Appellants do not explain why this distinction matters, however, and nothing in *Thomas* reveals its significance either. At the state trial, appellants had the opportunity to cross-examine Briseno concerning both extrinsic facts about the charged crime, and circumstances in his own situation which might lessen his credibility. It is that opportunity, rather than the scope or efficacy of its employment, which is important under Rule 804(b)(1).

reason to develop Briseno's testimony in the state trial with an eye to undermining his credibility and casting into doubt his statements about their behavior. *See United States v. Poland*, 659 F.2d 884, 895-96 (9th Cir. 1981) (holding that defendant's motive for cross-examination at suppression hearing was similar under Rule 804(b)(1) to his motive for cross-examination at trial).

Appellants maintain that their position is supported by *People of the Territory of Guam v. Hayes*, 1993 WL 469357 (D. Guam 1993), in which a three-judge panel held that the trial court erred in admitting former testimony because the defendant had not had the same *motive* to cross-examine the witness about certain facts in the first trial as he had in the second trial. However, the *Hayes* court made clear that this difference in motive occurred because "different issues arose at the second trial which [defendant] could not possibly have anticipated at the first trial." *Id.* at *2.[5]

Here, by contrast, there is no suggestion that either the factual nature of the case against appellants or appellants' motive for cross-examining Briseno changed at all from the first to the second trial. All that changed was the technology that appellants might have used to enhanced the Holliday videotape as a basis for questions in the cross-examination. Because this change constitutes a deficiency in neither the opportunity to cross-examine nor the motive for doing so, appellants' argument under Rule 804(b)(1) must fail.

[5] The victim in *Hayes*, "K.," testified at defendant's first trial, but then moved from Guam and was unavailable at the second trial. K.'s testimony from the first trial was introduced at the second trial. The prosecution also called as a witness Mrs. Muna, who testified about statements made by K. which were *not* disclosed at the first trial. The appellate court concluded that defendant's motive to cross-examine K. was different at the first than at the second trial, because at the first trial defendant did not have "the additional motivation . . . of proving that K. didn't make the statements attributed to her by Mrs. Muna." *Id.* at *2.

2. *Use of Videotape as Rebuttal Evidence*

Appellants next contend that even if there was no Confrontation Clause violation, the district court erred in admitting the Briseno videotape as rebuttal evidence. As district courts have wide latitude in deciding what constitutes proper rebuttal evidence, *Geders v. United States*, 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976), we review such determinations for an abuse of discretion. *Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

Appellants first argue that Briseno's testimony did not rebut anything presented in their defenses. We disagree. Briseno's testimony rebutted Koon's statement that Powell's first blow struck King on the shoulder area rather than on the head, Koon's expert's testimony that the officers' use of force was justified because King continue to be combative and aggressive, and Powell's former police instructor's testimony that Powell had done nothing he had not been trained to do.

Appellants next argue that even if some portions of the videotape properly rebutted elements of their cases, the district court nonetheless erred in permitting the government to introduce as rebuttal *both* those parts of the videotape which in fact rebutted their evidence, *and* those parts which were offered solely against Briseno.[6]

No one suggests that appellants have standing to appeal any violation of Briseno's rights which such procedure might have worked. Appellants instead claim that their own rights were

---

[6] Briseno neither testified nor presented any evidence on his behalf, save for introducing a single boot, one he had worn the night of the incident. At trial, he argued that his Fifth Amendment rights would be violated if his former testimony was admitted against him on rebuttal despite the fact that he had put on no evidence of his own. He was concerned primarily with those portions of the videotape in which he testified that he went to the police station to file a report on the use of force. The government's position was that Briseno never went to the police station and that his false exculpatory statement was proof of his consciousness of guilt.

violated because playing the *entire* redacted videotape as rebuttal gave the government's case against them "undeserved weight and dramatic force." Reply Br. of Powell at 23.

We reject this claim. District courts have broad discretion in deciding the order in which evidence may be presented at trial. *See* Fed.R.Evid. 611(a) (trial courts "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence"). Indeed, the Advisory Committee Notes to Rule 611(a) reveal that the rule was intended to avoid imposing on the district courts strict rules concerning the order in which evidence should be present. Moreover, several courts have held that district courts have wide discretion to allow the government to introduce as part of its rebuttal case evidence which might have been presented in the government's case-in-chief. *E.g., United States v. Tejada*, 956 F.2d 1256, 1267 (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 124, 121 L.Ed.2d 80 (1992); *United States v. Braxton*, 877 F.2d 556, 561 (7th Cir. 1989).

Here, where it was unclear whether Briseno would testify at trial, and where playing the videotape during the government's case-in-chief could have been unnecessarily duplicative, the district court did not abuse its discretion in allowing the government to postpone playing the videotape until its rebuttal case. *See Tejada*, 956 F.2d at 1267 ("Any other rule would require attorneys to present evidence in advance to rebut every possible scenario that defendants might paint"). Moreover, appellants were allowed to put on surrebuttal. *See United States v. Goodwin*, 770 F.2d 631, 638 (7th Cir. 1985) (defendant's ability to present a surrebuttal case helped defuse any prejudice which might have flowed from government's rebuttal).

Appellants have not shown how playing as rebuttal those portions of the videotape pertaining solely to Briseno unfairly prejudiced them. These portions represent only a small part of the entire tape. They reflect on Briseno's credibility as a witness and thus may have helped appellants by undermining the government's reliance on his incriminating statements about appellants. In any case, having the Briseno-related portions played along with the portions rebutting appellants' cases was

simply a consequence of the joint trial. In *United States v. Papia*, 560 F.2d 827, 848-49 (7th Cir. 1977), the Seventh Circuit held that evidence rebutting one defendant's case could also be introduced, on rebuttal, against a second defendant even if that defendant had, like Briseno, presented no evidence. All codefendants suffer what appellants claim to have suffered here: the accumulation of evidence of guilt which comes from being tried with other defendants. In an extreme case, this cumulative effect may indeed become so unfairly prejudicial that severance is warranted. But clearly this is not such a case. *Cf. United States v. Baker*, 10 F.3d 1374, 1386-89 (9th Cir. 1993) (district court did not abuse its discretion in failing to sever trial lasting over 16 months and involving 15 defendants, 250 witnesses, and 30,000 pages of transcripts).[7]

3. *Lay Opinion Testimony*

Many statements in which Briseno expressed his opinion about his codefendants' wrongdoing were excised from the videotape before it was shown to the jury. Appellants contend, however, that various statements of opinion remained.

Many of the statements about which appellants complain are simply not opinions. Appellants argue that even Briseno's descriptions of the other officers' actions should not have been admitted. Appellants seem to suggest that these descriptions were akin to opinions insofar as they revealed that Briseno was testifying against his codefendants rather than on their behalf.

---

[7] Appellants also contend that the admission of the video as rebuttal was inappropriate under *United States v. Neary*, 733 F.2d 210 (2d Cir. 1984), because they each had a Rule 29 motion pending. *Neary*, however, held that where the district court has erred in failing to grant defendant's Rule 29 motion at the close of the government's case-in-chief, the government cannot cure the deficiencies in its proof by pointing to evidence it presented on rebuttal, because doing so would "make a mockery" of the defendant's right under Rule 29 to acquittal where the government has not satisfied its burden of proof in its case-in-chief. *Id.* at 219-20. *Neary* would thus apply only if the government proof fell short at the close of its case-in-chief. That is not the case here. *See* Section 1, *infra*.

Whomever they have hurt or benefitted, however, the straightforward physical descriptions in question do not constitute opinions.

Appellants also contend that Briseno's statement that he went to the Foothills police station intending to report a use of force should not have been admitted, because he would not have taken this action unless he believed that the use of force had been wrong. We decline to adopt a rule barring testimony about actions which are motivated by opinions. Actions are usually motivated by opinions or beliefs, but testimony about the actions is clearly not for that reason inadmissible. Koon's testimony, for example, was filled with descriptions of actions he took because he had formed certain opinions about King's behavior.

Appellants argue that they were prejudiced when the jury learned of Briseno's statement that Powell was "out of control." This phrase was removed from the redacted version of Briseno's testimony presented to the jury. When Koon was recalled as a surrebuttal witness, however, the prosecutor on cross-examination twice referred to the fact that Briseno had said that Powell was out of control. Appellants contend that this interjection of Briseno's opinion was improper.[8]

The Federal Rules of Evidence allow lay opinion testimony so long as the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the

---

[8] Appellants' argument is based on the contention that Briseno's statements constituted lay opinion testimony. While we reject this argument, *see infra*, we note that by questioning Koon about a redacted portion of the Briseno videotape, the government improperly referred to a matter not in evidence. We conclude, however, that the error (to which no objection was made) did not affect substantial rights. The transcript of the videotape which was admitted into evidence contained opinion statements much more directly damaging to appellants than the "out of control" statements - such as Briseno's statement that the force used by Powell and Wind was unjustified. And as discussed below, *see infra* Section 1, there was ample evidence quite apart from the Briseno videotape on which the convictions could be sustained. The "out of control" statements were a tiny portion of a case which the government tried in extraordinary detail. *See Koon*, 833 F. Supp. at 774.

witness' testimony or the determination of a fact in issue." Fed.R.Evid. 701; *United States v. Juvenile Male*, 864 F.2d 641, 647 (9th Cir. 1988) (admitting, under Rule 701, witness's opinion as to defendant's intent); *accord United States v. Simas*, 937 F.2d 459, 464 (9th Cir. 1991). Both requirements were met here. First, Briseno's opinions were rationally based on his first-hand observations. Second, the opinion that Powell was out of control was helpful in determining factual issues central to the case. Appellants are wrong that Briseno's statements are no more than conclusory assertions about ultimate issues. The ultimate issue in the case was not whether the defendants were out of control, but whether they willfully used unreasonable force. The fact that Powell may have been out of control could have helped the jury resolve that issue; at the same time, it certainly did not settle the issue in and of itself.[9] Briseno's statement thus was not "testimony which merely tells [the jury] what result to reach." 3 *Weinstein's Evidence* ¶ 701[02], at 702-25.[10]

In sum, we conclude that no error was committed in the admission of the Briseno videotape.

B. *Fifth Amendment Protection Against Use of Compelled Statements*

After they were warned that they could lose their jobs if they refused to make statements, Koon and Powell gave

---

[9] Moreover, the court admitted characterizations of Powell's actions, which were *helpful* to the defense—most notably, Briseno's statement that the first baton to King's head was accidental. The statement that an officer swinging a baton is out of control, like the statement that an officer has hit a suspect with a baton by accident, is both an opinion and an observation.

[10] Appellants also argue that Briseno's opinions impermissibly entered the case when the prosecutor, in closing, stated that Briseno had "testi[fied] that other people committed crimes," and that "[t]he videotape of [Briseno's] testimony shows that the beating of Rodney King was unreasonable." RT 4/10/93 (AM) at 103. But these statements are better read as permissible inferences drawn from the factual testimony which the jury heard than as surreptitious references to the opinion testimony which was excised.

compelled statements to the LAPD Internal Affairs Division. Appellants contend that the introduction of codefendant Briseno's state trial testimony and the testimony of prosecution witness Mark Conta violated their Fifth Amendment rights because Briseno and Conta were exposed to appellants' compelled statements prior to testifying.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Constitution thus requires that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

In accordance with this fundamental principle, the Supreme Court has recognized that the Fifth Amendment protection against coerced statements extends to public employees who must choose either to incriminate themselves or to forfeit their jobs during an administrative hearing. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Thus, where police officers such as Koon and Powell invoke their Fifth Amendment rights and subsequently make a statement under threat of removal from office, the statement is compelled and the government is precluded from using either the statement or information derived from it as evidence in the federal trial. *Id.* at 497, 87 S.Ct. at 618; *see also Kastigar v. United States*, 406 U.S. 441, 460-61, 92 S.Ct. 1653, 1664-65, 32 L.Ed.2d 212 (1972).

Once a defendant has demonstrated that his statements were compelled, the government has the burden of proving in a "*Kastigar* hearing" by a preponderance of the evidence that the evidence it intends to introduce in a subsequent criminal proceeding is not tainted by exposure to the compelled statements. *Kastigar*, 406 U.S. at 461-62, 92 S.Ct. at 1665-66; *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), *cert. denied*, 469 U.S. 835, 105 S.Ct. 129, 83 L.Ed.2d 70 (1984).

In this case, the parties disagree as to the precise type of showing that is required to establish that a witness who has been exposed to compelled testimony is not tainted by that exposure. Our circuit has twice considered this issue in the context of testimony that was compelled pursuant to federal immunity statutes. *See* 18 U.S.C. § 6002. In both cases, we held that the government meets its *Kastigar* burden by showing that each matter as to which the witness will testify is derived from a source independent of the immunized testimony.[11]

In *United States v. Lipkis*, 770 F.2d 1447 (9th Cir. 1985), the defendant first made voluntary statements on three occasions to an FBI agent and subsequently made identical statements to the same agent under a grant of immunity. *Id.* at 1449. The FBI agent became the government's witness at trial and Lipkis argued that the agent's testimony should have been excluded because it was tainted by the agent's exposure to the compelled statements. We held that because the defendant's immunized statements were the same in every material respect as the prior, non-immunized statements, the government had met its burden of proving that all the evidence introduced at trial was derived from a legitimate source that was wholly independent of the immunized statements. *Id.* at 1449-51.

Similarly, in *Rogers*, a government witness had attended a proceeding in which the defendant testified under a grant of immunity. On appeal, we held that the witness's testimony was permitted because it was clear that it was based on information

---

[11] The government expresses some concern about applying cases that analyze federal use immunity statutes in the *Garrity* context. However, in *Kastigar*, the leading Supreme Court case regarding use immunity granted pursuant to 18 U.S.C. § 6002, the Court upheld the constitutionality of the federal immunity statute because it concluded that the statute provided immunity that was coextensive with the Fifth Amendment protections. 406 U.S. at 463, 92 S. Ct. at 1666. Because the use of compelled testimony in the *Garrity* context also directly implicates the individual's Fifth Amendment right against self incrimination, *Kastigar's* discussion of the scope of the Fifth Amendment privilege against self-incrimination is directly relevant in the *Garrity* context.

the witness learned on his own rather than on the immunized testimony. *Rogers*, 722 F.2d at 560.

The standard applied in our circuit is taken directly from the language of *Kastigar*, which provides:

> Once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related [to the current prosecution], the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
>
> This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

406 U.S. at 460, 92 S.Ct. 1665 (internal citations omitted) (quoting in part *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18, 84 S.Ct. 1594, 1609 n.18, 12 L.Ed.2d 678 (1964)). Thus, under *Kastigar* and this circuit's precedent, the prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defendant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify.

Appellants contend that we should reject the holding of *Rogers* and *Lipkis* and instead adopt the standard recently articulated by the District of Columbia Circuit in *United States v. North ("North I")*, 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991), and *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 656, 121 L.Ed.2d 583 (1992). These cases, in what is "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony," *United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1162, 117 L.Ed.2d 409 (1992), require the prosecution to make a two part showing to meet its *Kastigar* burden. First, as in our circuit, the

prosecutor must prove that there is an independent source for all matters on which the witness testifies. *Poindexter*, 951 F.2d at 373. And second, the prosecutor must prove that any witness exposed to compelled statements has not shaped or altered her testimony in any way, either directly or indirectly, as a result of that exposure. *Id.*, *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860-63, 872-73.[12]

In asking us to apply *North* and *Poindexter*, appellants fail to acknowledge that those cases are not the law of this circuit. In fact, we have previously rejected contentions similar to appellants' that *Kastigar* requires a greater showing on behalf of the prosecution. In *Lipkis*, the prosecution witness had been exposed to both immunized testimony and to non-immunized testimony. In affirming the district court, we specifically rejected the defendant's contention that *Kastigar* required the prosecution to prove that the witness's testimony was based on only the non-immunized statements and not on the identical immunized statements, recognizing that such a showing was both impossible and unnecessary. *Id.* at 1451.

In sum, it is the law of our circuit that the prosecutor's *Kastigar* burden is met if the substance of the exposed witness's testimony is based on a legitimate source that is independent of the immunized testimony. Ensuring that the content of a witness's testimony is based on personal knowledge provides the required Fifth Amendment protections and meets the *Kastigar*

---

[12] In *North I*, the D.C. Circuit stated that this burden could be met by establishing that the witness's allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred. *North I*, 910 F.2d at 872-73. On rehearing, the court modified the requirement that the exposed witness's testimony be "canned," stating that this was only an example of the ways in which the prosecution's burden might be met. *North II*, 920 F.2d at 942-43 (but noting that "it may well be extremely difficult for the prosecutor to sustain its burden of proof" in the absence of canned testimony).

requirement that the defendant's compelled statements shall not be used against him in subsequent criminal proceedings.[13]

1. *Briseno's Testimony*

Prior to admitting the videotape of Briseno's state trial testimony, the district court held a *Kastigar* hearing in which it

---

[13] The standard articulated by the D.C. Circuit to statements that are compelled in the *Garrity* context has potentially far-reaching ramifications. As the *North* court recognized, federal immunity statutes provide a framework for a prosecuting attorney or Congress to make a reasoned decision as to whether the benefits of obtaining compelled testimony justify the obstacles that may be created in any future prosecutions. The process of formal grants of immunity also provides time for the prosecutor to protect the testimony of potential witnesses by obtaining canned statements and by shielding these witnesses from exposure to the immunized testimony. *North II*, 920 F.2d at 945-46.

In contrast, immunity attaches in the *Garrity* context when a threat of the loss of employment forces a public employee to respond to questioning by another public employee. In this context, the individuals who question the employee are concerned about potential misconduct, and their goal is generally to learn the facts of a situation as quickly as possible. They do not necessarily act with the care and precision of a prosecutor weighing the benefits of compelling testimony against the risks to future prosecutions; indeed, they may not even have the prospect of prosecution and the requirements of the Fifth Amendment in mind. In addition, because statements may be compelled soon after the event in question, it is far more likely that these statements will be circulated before there is an opportunity to can testimony. Although this may occur out of a legitimate desire to ascertain the truth of the matter, it may also occur out of a desire to protect one's colleagues. Thus, in the context of internal affairs investigations, police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal prosecution at serious risk and possibly barring prosecution altogether.

We do not mean to suggest that the showing required under the Fifth Amendment varies depending on the situation in which the testimony was compelled. The Fifth Amendment protects defendants from the use of their compelled statements regardless of when or where the statements were taken. We merely point out the implications of applying *North* in the *Garrity* context. In light of those implications and because we believe that the standards enunciated by our circuit comply fully with the requirements of the Fifth Amendment, we decline to adopt the D.C. Circuit's more protective standard.

assumed that Briseno had read Koon's and Powell's compelled statements[14] and considered whether Briseno's state trial testimony was tainted by the exposure. The court concluded that Briseno's testimony was not tainted by the exposure to the compelled statements. We review this factual finding for clear error, *see Rogers*, 722 F.2d at 560, and conclude that it is not clearly erroneous.

The record reflects a legitimate, independent source of information with respect to each matter as to which Briseno testified. Briseno was an eyewitness to the events at issue in the trial and thus had independent personal knowledge of the events to which he testified. In addition, other witnesses at the state trial, including CHP officers Melanie Singer and Timothy Singer and police officer Solano, testified before Briseno and in his presence at length about the events surrounding the arrest of Rodney King. Briseno also saw the Holliday videotape prior to giving his own testimony. Finally, both Koon and Powell testified at the state trial before Briseno testified; Briseno was present in the courtroom on those occasions and heard appellants' testimony. At the *Kastigar* hearing, the government presented an annotated transcript of Briseno's state testimony, indicating the independent sources for all of the same information contained in the compelled statements.

This case is therefore like *Lipkis*, in which a witness was exposed to two substantially identical statements, one of which was immunized and one of which was not. Like the prosecution in *Lipkis*, the prosecution in this case successfully established that Briseno's state trial testimony had a basis in legitimate, independent sources and therefore was not tainted by any exposure to Koon's and Powell's compelled statements.

---

[14] The parties stipulated that Briseno received appellant's compelled statements. Pursuant to *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 P.2d 774 (1975), LAPD officers who face disciplinary proceedings are provided with a "*Skelly* package" containing all of the evidence from internal investigations of the matter, including the compelled statements of other LAPD officers.

2. Conta's Testimony

Appellants also object to the testimony of Mark Conta, the government's use-of-force expert. At the time of the federal trial, Conta was the officer in charge of physical training and self-defense at the Los Angeles Police Academy. At trial he testified regarding use-of-force policy and gave his opinion that most of the baton blows inflicted by Powell and Wind during King's arrest were contrary to LAPD policy. Prior to trial, the district court held a *Kastigar* hearing and found that Conta had not been exposed to the compelled statements. We conclude that this finding is not clearly erroneous.

Appellants claim that Conta was indirectly exposed to their compelled statements in two ways. First, they contend that Conta listened to the testimony of Fred Nichols, the use-of-force expert the state intended to use at the state trial, at a *Kastigar* like hearing during the state trial. At that time, Nichols was Conta's supervisor and the officer in charge of physical training and self-defense at the Los Angeles Policy Academy. Although the state had planned to use Nichols as its use-of-force expert at the state trial, Nichols was disqualified as a witness after he testified at the state *Kastigar* hearing that he was exposed to the compelled statements and that his testimony would be affected by this exposure. Appellants contend that because Conta was present at this hearing at which Nichols testified regarding his exposure to the compelled statements, Conta also was exposed to the compelled statements.

Conta's presence at the state hearing, however, did not expose him to the compelled statements. The transcript of the hearing reflects that Nichols testified only regarding when he was exposed to the compelled statements and whom he spoke to about those statements. Nichols did not quote or read from the compelled statements, nor did he engage in any discussion regarding the substance of the statements.

Appellants also contend that Conta was exposed to the compelled statements during approximately twenty informal discussions with Nichols about the King incident. At the *Kastigar* hearing, Conta agreed that he conversed with Nichols about the King incident but stated that at no time did Nichols

make any statement that related to or appeared to relate to the content of the compelled statements. Conta further testified:

> You see, when the Rodney King incident occurred two years ago today, and we witnessed the TV portions of the tape and then on March the 8th I watched the tape in its entirety as I indicated, and I knew at that time that Sergeant Nichols was probably going to come forward and represent [sic] the state during the prosecution process, and I also knew that sergeant--excuse me--Detective Arce and Kwock who were at the office at this time had requested that Sergeant Nichols prepare a document.
>
> Sergeant Nichols told me that this document was confidential and that he was going to render an opinion that was going to go to the state grand jury. That was a cue to me, and it was very clear in my mind, that Sergeant Nichols was on a mission, and it was his responsibility, and that he was going to go forward and testify for the prosecution, and he was going to go forward and prepare this document. And he told me that he was going to prepare this document and that it was confidential. Confidential. I wanted to stay away from him. I felt that it was his thing and that I wanted to stay away and I didn't want to get into any deep discussions regarding the Rodney King incident based on that fact and that information.

RT 3/3/93 at 39. In addition, Conta noted that his testimony at trial would be based on his twenty-two years of experience as a police officer, his education as a training officer for nine and a half years, his training at the Los Angeles Police Academy in the use-of-force policy and self defense techniques, his review of the Holliday videotape, the arrest report prepared by Powell, the sergeant's log prepared by Koon, a use-of-force report, a CHP supplemental report, and the state trial testimony of Koon, Powell, and Briseno.

Faced with this evidence, the district court found that Conta was not exposed to appellants' compelled statements. We conclude that this finding is not clearly erroneous.

C. *Severance*

Appellants challenge the district court's refusal to sever their trial from codefendant Briseno's. We review a district court's denial of a motion to sever a trial for an abuse of discretion. *United States v. Vasquez-Valasco*, 15 F.3d 833, 844 (9th Cir. 1994); *United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir.), *cert. denied*, ___ U.S.___, 113 S. Ct. 475, 121 L.Ed.2d 381 (1992).

Fed.R.Crim.P. 14 governs the severance of defendants or charges.[15] Rule 14 recognizes that even when defendants are properly joined under Fed.R.Crim.P. 8(b), severance may be appropriate to avoid prejudice to a defendant. The party seeking reversal of the denial of a motion to sever bears the burden of proving such "clear, manifest, or undue prejudice from the joint trial, that [it] violates one of his substantive rights, so that the prejudice is of such a magnitude that the defendant was denied a fair trial." *E.g.*, *Vasquez-Valasco*, 15 F.3d at 845-46 (internal quotations omitted).

In this case, appellants argue that the district court should have severed the trial on the grounds that they and Briseno presented mutually antagonistic defenses.[16] *See, e.g., United*

---

[15] Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

[16] We reject the government's contention that Powell waived his right to appeal this issue because he failed to renew his motion to sever at the close of the government's case. Although a defendant generally waives a severance motion by failing to renew it at the close of evidence, "[t]his requirement is not an inflixible one; waiver may be absent when the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2332, 124 L.Ed.2d 244 (1993) (internal quotations omitted).

[Footnote continued on next page]

States v. Tootick, 952 F.2d 1078, 1083-86 (9th Cir. 1991); *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990). Appellants' argument is without merit.

The fundamental flaw in appellants' claim is that Briseno did not raise an inconsistent defense in the federal trial; in fact, the only independent defense he raised was to offer into evidence the boot he wore on the night in question. Thus, no antagonistic defenses were raised in the federal trial.

In fact, Appellants' argument rests on the fact that their defense strategy in the *state* trial differed from that of Briseno: while appellants' defense was that no excessive force was used, Briseno's defense was that his fellow officers used excessive force which he tried to prevent. Admission of the videotape of Briseno's state trial testimony did not constitute grounds for severance, however, because the majority of statements on the videotape were admitted into evidence to rebut assertions made by Koon and Powell, *see* Fed.R.Evid. 804(b)(1); *Zafiro v. United States*, ___ U.S. ___, ___ 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993), and therefore would have been admitted even if Briseno had not been a codefendant in the federal trial. Moreover, the evidence from the videotape which was admitted solely against Briseno was not unduly prejudicial to appellants. That evidence consisted primarily of Briseno's testimony in the state trial that, after the use of force, he was upset about the use

---

[Footnote continued from previous page]

"The guiding principle is whether the defendant diligently pursued the motion." *Vasquez-Velasco*, 15 F.3d at 845 & n.9 (internal quotations omitted). In this case, Powell diligently pursued the motion; he moved to sever the trial prior to trial and renewed his motion immediately prior to the admission of the evidence deemed prejudicial--the recorded trial testimony of Briseno. *Id.* at 845. Moreover, the district court had previously denied the defendants' motions for severance on two occasions, indicating that a renewal of the motion after the government's rebuttal would have been an unnecessary formality. *See Cuozzo*, 962 F.2d at 949, n.5; *United States v. Kaplan*, 554 F.2d 958, 966 (9th Cir.), *cert. denied*, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1977).

of force and returned to the policy station to report the incident. Briseno testified that while he was at the station he noticed a message from Koon over the Mobile Digital Terminal which he interpreted as a report of the incident, and he decided that he did not need to file a report because Koon had already reported the incident. This testimony was neither mutually antagonistic to appellants' defense nor was it unduly prejudicial.

Even if we were to assume that the videotape was admitted only because Briseno was a codefendant, Briseno's state trial defense and appellants' federal defense were not irreconcilable. Although we have recognized that "mutually antagonistic" or "irreconcilable" defenses may be so prejudicial as to require severance, severance based on these grounds is appropriate only when "the acceptance of one party's defense will preclude the acquittal of the other party.... [T]he essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *United States v. Sherlock*, 962 F.2d 1349, 1362-63 (9th Cir.) (internal citations and quotations omitted), *cert. denied*, ___ U.S. ___, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992). In this case, the Briseno tape and appellants' defense were not mutually exclusive because a jury could find that Briseno thought the force was excessive while also finding that the force was not in fact excessive. *See, e.g., United States v. Arias-Villanueva*, 998 F.2d 1491, 1506-07 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 359, 126 L.Ed.2d 322 (1993). Alternatively, a jury could believe Briseno's testimony that the use of force was excessive but also acquit all of the officers on the grounds that it was not willful.

Appellants also suggest that their defenses were mutually antagonistic because they have taken adversarial positions to Briseno in Rodney King's subsequent civil suit. Appellants do not explain how such a factor is in any way relevant to the district court's denial of their motion to sever in the criminal case. We therefore conclude that because no mutually irreconcilable defenses were presented by Briseno and

appellants, the district court did not abuse its discretion in refusing to sever the trial.[17]

D. *District Court's Failure to Disqualify Powell's Counsel*

Koon contends that the district court erred by failing to disqualify Powell's attorney before trial. Most of the relevant facts are not disputed. Shortly after the Rodney King incident, the Los Angeles Police Protective League appointed Michael Stone, its General Counsel, to represent Powell. Darryl Mounger was appointed to represent Koon. Stone also represented Powell in the federal civil case related to this case. Mounger, however, declined to represent Koon in the civil case. In an effort to assist Koon, Stone contacted Thomas Feeley, a civil rights defense lawyer. Feeley agreed to represent Koon in the civil case.

While the state criminal action and the federal civil action were pending, Stone and Feeley joined their practices. They obtained written waivers of conflict from their clients before forming the new firm. After the firm was formed, oral waivers were taken on the record in the state criminal proceeding.

Eleven months after the waiver in state court, and three months before the federal criminal trial was to begin, Koon revoked his waiver and requested that the district court grant whatever relief it deemed appropriate under *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Koon explained that intervening events had led him to believe that a conflict existed. The most important of these events stemmed from the formation of the partnership between Feeley and Stone: Koon feared that Stone might gain access to

---

[17] Even in cases in which defendants do raise mutually antagonistic defenses, there is no per se rule requiring severance. *See Zafiro*, ___ U.S. at ___, 113 S.Ct. at 938 (stating that "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion").

confidential information possessed by Feeley, and might use it to Koon's disadvantage in the criminal trial.

The district court's solution was to disqualify Feeley from representing Koon in the civil trial, but to allow Stone to continue to represent Powell in the criminal trial. We review that decision for abuse of discretion. *See United States v. Baker*, 10 F.3d 1374, 1399 (9th Cir. 1993).

1. *The Stone & Feeley Partnership*

As the district court explained, the conflict asserted here more closely resembles "successive representation" than "dual representation." The problem Koon complains of is not that his attorney in the criminal case was unable to be completely loyal to him, but rather that confidences which he had divulged to an attorney in another case might be used against him in the criminal case.

The leading case on successive representation in this circuit is *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), in which we restated the rule that an attorney must be disqualified if he or she formerly represented an adverse party in a matter "substantially related" to the current representation. *Id.* at 998 (citing *Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F.2d 1322, 1325 (9th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d (1976)). Substantial relationship may be presumed where there is a "reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation." *Id.* at 998. But even if there is no sharing of confidences, "[t]he substantial relationship between the two representations is itself sufficient to disqualify." *Id.* at 999.

Attorney conflict may require a court to disqualify counsel despite the fact that the rights of a party may be compromised by that disqualification. While a trial judge "must recognize a presumption in favor of [defendant's] counsel of choice ... that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700.

The task for the district court was to balance Powell's qualified Sixth Amendment right to the counsel of his choice

against the potential for conflict asserted by Koon. *See United States v. Wheat*, 813 F.2d 1399, 1402 (9th Cir. 1987), *aff'd*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *United States v. Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982).

The district court recognized that Powell's interest in retaining Stone was strong. Stone had represented Powell at the state criminal trial, had obtained good results for him there, and was familiar with the case.

The district court found that Koon's interests, by contrast, were weak. The court noted that at the time Feeley and Stone joined their practices, their firm adopted screening procedures designed to ensure that confidential information Koon had imparted to Feeley would not be disclosed to Stone. There was also evidence that Stone had never discussed confidential information about Koon with Feeley, did not have access to Feeley's files, and had never met with Koon outside the presence of one of Koon's criminal attorneys.

This circuit has not yet decided whether such screening procedures, or such evidence, may rebut the presumption that lawyers in the same law firm share information. *See Trone*, 621 F.2d at 999 n.4; *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 442 (9th Cir. 1983). We need not resolve that issue here. On appeal, we have the advantage of hindsight. Allowing Stone to continue as Powell's attorney worked no disadvantage to Koon: Koon points to nothing in the course of trial which even suggests that Stone behaved adversely to him on the basis of confidential information, or, indeed, that Stone behaved adversely to him at all.

This court has cautioned that where a criminal defendant's right to the counsel of his choice is at loggerheads with the need for conflict-free counsel, "[r]eviewing courts should be especially wary of complaints of error," because trial courts are placed "in a position to be whipsawed in the expectation of a guaranteed error no matter which way the courts rule." *Wheat*, 813 F.2d at 1402. Here, where Koon can point to *no ill consequence* flowing from the district court's elevation of Powell's right to the counsel of his choice over Koon's right to avert a possible breach of confidentiality, we cannot say that the

district court abused its discretion when it found that Koon had shown neither an actual conflict nor a serious potential for conflict. As subsequent events have made clear, the district court accurately assessed the possibilities.[18]

2. Other Allegations of Conflict

Koon also argues that a conflict was evidenced by the following facts: (1) Stone returned to the government a memorandum the government had inadvertently disclosed, and did so without showing the memorandum to Koon; (2) Powell's position on certain evidentiary issues was contrary to Koon's; (3) Powell's sister worked as a secretary in Stone's law office; and (4) Stone had announced during the state court proceedings that an expert might not be able to testify because of an attorney-client relationship with Stone.

The district court found that none of these facts established a conflict: (1) Stone acted properly by returning the government memorandum; (2) Powell's and Koon's positions on evidentiary issues were not necessarily inconsistent; (3) no showing had been made that Powell's sister had access to any material pertaining to Koon; and (4) Koon's fear that potential expert witnesses in *this* case would decline to testify based on previous

---

[18] We recognize that the district court also had an obligation to ensure that the proceedings *appeared* to be fair. *See Wheat*, 486 U.S. at 160, 108 S.Ct. at 1698. For this reason, it might be argued that rules relating to conflict must be applied prophylactically, and that we must review this case without benefit of hindsight. If we were to constrain ourselves to such an application, the result would be no different. Even at the time the district court ruled on the matter, Koon had shown little more than the appearance of a conflict. We have expressed "grave doubts" as to whether mere appearances would ever be enough to deprive a criminal defendant of the right to counsel of his choice, *United States v. Washington*, 797 F.2d 1461, 1466 (9th Cir. 1986), and we note that the test formulated in *Wheat* itself directs courts to look for a "*serious potential* for conflict," rather than the mere appearance of conflict. 486 U.S. at 164, 108 S.Ct. at 1700. Here, where Powell had a strong Sixth Amendment right in retaining Stone as his attorney, we conclude that the district court did not abuse its discretion in protecting that right rather than removing what can only be characterized as the possible appearance of a highly attenuated conflict.

contacts with Stone was speculative, and his fear that Stone might place future business advantage ahead of the welfare of defendants was unsupported by evidence.

On appeal, Koon presents nothing to refute these findings. We therefore conclude that the district court did not abuse its discretion by declining to disqualify Powell's attorney.

E. *Double Jeopardy Claim*

Appellants challenge the district court's refusal to grant them a hearing on their claim of double jeopardy. Prior to trial, appellants requested an evidentiary hearing to determine if there was sufficient collusion between federal authorities and the state authorities to preclude the federal prosecution under *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). We review the court's denial of this motion for an abuse of discretion. *United States v. Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984).

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Nevertheless, under the doctrine of dual sovereignty, successive prosecutions based on the same underlying conduct do not violate the Fifth Amendment's Double Jeopardy Clause if the prosecutions are brought by separate sovereigns. *Heath v. Alabama*, 474 U.S. 82, 93, 106 S.Ct. 433, 440, 88 L.Ed.2d 387 (1985); *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990).

Our circuit has recognized a narrow exception to this general rule: "[i]f the second prosecution, otherwise permissible under the dual sovereignty rule, is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute, it may be subject to a successful double jeopardy challenge." *Guy*, 903 F.2d at 1242; *see also United States v. Figueroa-Soto*, 938 F.2d 1015, 1018-19 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1181, 117 L.Ed.2d 424 (1992). This exception is referred to as the "*Bartkus* exception" in reference to the Supreme Court

case from which it was derived. *See Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959).

To establish double jeopardy, it is not sufficient for the defendant to show that there was cooperation between federal and state authorities; rather, the defendant must prove that the subsequent prosecuting entity is a "tool" for the first, or the proceeding is a "sham," done at the behest of the prior authority. *Figueroa-Soto*, 938 F.2d at 1019; Guy, 903 F.2d at 1242-43; *United States v. Bernhardt*, 831 F.2d 181, 182 (9th Cir. 1987).[19] In this case, appellants ask us to remand this case for an evidentiary hearing to determine whether the federal government's prosecution was the product of state and federal collusion extensive enough to amount to a second prosecution by the state. Although we have never articulated what a defendant must show to obtain an evidentiary hearing, we have stated that he must make more than "conclusory allegations" of collusion. *Russotti*, 717 F.2d at 31.

Appellants point to several factors which, they contend, warrant a hearing in this case: (1) the federal investigation began when the crime occurred and remained active during the state investigation and prosecution; (2) federal and state authorities cooperated with each other, and the state delivered evidence and investigative reports to federal authorities after the

---

[19] The *Bartkus* exception is narrow, and seldom successfully pursued. *E.g., United States v. Paiz*, 905 F.2d 1014, 1024 (7th Cir. 1990) (compiling list of cases), *cert. denied*, 499 U.S. 924, 111 S.Ct. 1319, 113 L.Ed.2d 252 (1991). Our decision in *Figueroa-Soto* demonstrates the narrowness of the exception. 938 F.2d 1015. In *Figueroa-Soto*, we concluded that the *Bartkus* exception did not apply, even though the state prosecuted at the request of federal authorities; federal agents assisted the state prosecution, sat at the state prosecutor's table, and testified as witnesses; evidence collected by federal authorities was given to state authorities for use in the state trial; the sentence of one prosecution witness was postponed until he had testified at the state trial; a federal forfeiture proceeding was delayed so as not to prejudice the state prosecution; FBI agents prepared state trial witnesses; and the state prosecutor was appointed as special assistant to the U.S. Attorney and paid by the state for the subsequent federal prosecution. *Id.* at 1018-19.

state prosecution; (3) witnesses who testified in the federal trial were interviewed by the federal authorities soon after the incident; and (4) the Briseno videotape was admitted into evidence in the federal trial.

Despite these factors, appellants point to nothing that suggests the federal prosecution was merely a sham. These factors at most show cooperation between federal and state authorities. The fact that the federal government has conducted its own investigation weakens appellants' argument, as it indicates that the federal government was not a "tool" of the state authorities. *See Guy*, 903 F.2d at 1243. Moreover, the fact that evidence developed from the state trial was used in the federal trial does not create a double jeopardy problem. *Cf. Figueroa-Soto*, 938 F.2d at 1018-19 (evidence collected by federal authorities given to state authorities for state prosecution).

In sum, there is no evidence that the federal prosecution was a "sham" or a "cover" for the state prosecution. *Cf. Bernhardt*, 831 F.2d at 181-83 (remanding for further factual finding where defendant showed that state prosecutor, who could not prosecute defendant due to statute of limitations, enlisted U.S. Attorney in prosecution with the understanding that the state prosecutor would be the lead attorney in the federal case and would be paid by the state); *see also Paiz*, 905 F.2d at 1025 no.14 (no hearing required where defense showed that federal agent was involved in state investigation and arrest and that state prosecutor was designated a U.S. attorney for the federal prosecution). The district court did not abuse its discretion in denying appellants' motions for an evidentiary hearing.

F. *Denial of Appellants' Peremptory Challenges*

Appellants claim that the district court denied them the right to exercise peremptory challenges against two black jurors.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the discriminatory exercise of peremptory challenges violates the equal protection clause. *Batson*'s holding has been extended to peremptory challenges exercised by criminal defendants.

Georgia v. McCollum, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *United States v. DeGross*, 960 F.2d 1433, 1339-42 (9th Cir. 1992) (en banc). Under *Batson*, the prosecution first must make out a prima facie case of racial discrimination; to rebut, the defense must then articulate a race-neutral explanation for the challenge. *McCollum*, ___ U.S. at ___, 112 S.Ct. at 2359.[20] We review the district court's factual findings for clear error. *DeGross*, 960 F.2d at 1442.

1. *Juror No. 263*

Juror No. 263, a black man, provided the following answers on a questionnaire he filled out before voir dire:

> 98. (a) How would you describe the media coverage of the underlying incident between the police officers and Rodney King?
>
> _X_ Fair and accurate
>
> ___ Distorted and exaggerated
>
> (b) How would you describe the media coverage of the previous trial?
>
> _X_ Fair and accurate
>
> ___ Distorted and exaggerated
>
> * * * * *
>
> 109. What was your personal initial reaction to the verdicts in the state court trial?
>
> **My personal reaction was unfair.**[21]

---

[20] On appeal, Koon and Powell raise not a *Batson* claim but the reverse of one: They claim that their right to exercise peremptory challenges was violated because the district court went too far in protecting *Batson* rights asserted by the government. Since the question is what the proper limits of *Batson* are, the same analytic framework applies. *See United States v. Bentley-Smith*, 2 F.3d 1368, 1373-77 (5th Cir. 1993).

[21] Throughout the voir dire, it was assumed that Juror No. 263 meant that he felt the verdicts were unfair.

110. Did you feel that justice had been served or were you disappointed with the verdicts?

Disappointed.

When Juror No. 263 was questioned on voir dire his answers changed. He stated that he no longer thought the verdict was unfair, and explained that his ideas had changed "after listening to things" said by others during the voir dire. RT 2/22/93 at 62. He said that his opinion now was that justice had been served by the Simi Valley verdicts; he was no longer disappointed in those verdicts. He also stated that although he thought at the time the Holliday videotape was first aired that what the defendants had done was wrong, he had now changed his perception, because through the voir dire he had come to realize that he "didn't have the whole facts to base an opinion on." *Id.* at 75.

Juror No. 263 had also written on his questionnaire that what he remembered about the Rodney King case "was how had the news people handled a very important trial." *Id.* at 61. On voir dire, he explained that in this answer he had been referring to the news media's exploitation of the event.

A defense challenge for cause was denied. The defendants then sought to exercise a peremptory challenge. The government objected on *Batson* grounds, and the district court asked the defense to articulate race-neutral reasons for the challenge.

Appellants contend that the district court erred by not first requiring the government to make out a prima facie case. At this stage, however, any error of this kind is irrelevant: "[o]nce the party making the peremptory challenge has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [party opposing the peremptory challenge] had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991) (plurality opinion); *United States v. Changco*, 1 F.3d 837, 839-40 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 619, 126 L.Ed.2d 583 (1993) (same); *United States v. Bishop*, 959 F.2d 820, 824 (9th Cir. 1992) (same).[22]

The defense furnished two reasons for challenging Juror No. 263: the juror's answers about press coverage were inconsistent both within the questionnaire and with his answers in court; and Juror No. 263 had stated on his questionnaire that he was disappointed in the Simi Valley verdicts, and found them unfair. To refute these reasons, the government argued (1) that Juror No. 263's answers regarding the press were not inconsistent, and (2) that Juror No. 263's answers on the questionnaire regarding the Simi Valley verdicts were superseded by the more favorable answers he gave on voir dire, and that the defense had accepted non-minority jurors who had changed their answers in apparent response to the educative process of the voir dire. The government also argued that the defense had engaged in a pattern of exercising peremptory challenges against minority jurors, and that defense counsel had questioned minority jurors vigorously, in an attempt to unearth something which would serve as a basis for disqualification, while using voir dire with white jurors as an opportunity to educate and indoctrinate.

The district court, after hearing argument from all counsel, stated as follows:

> [T]he Court believes and so rules that the government has made a prima facie showing and that considering the totality of the circumstances that do pertain, the explanation for the challenge is insufficient, it does not meet the test and, therefore, the challenge will not be allowed.

---

[22] *Hernandez* and the cases following it dispense with appellants' argument that "the trial court unfairly imposed a higher burden on the defense to shift the burden to the government when it exercised peremptory challenges to white jurors than it imposed on the government to shift the burden to the defense to justify its challenges to black jurors." Br. of Powell at 31. Since the "height" of the initial burden is moot at this stage, differing heights for different parties are of no significance.

RT 2/22/93 at 105. In reviewing this finding, we must consider "all relevant circumstances," including any pattern of peremptory challenges against minority jurors and the questions and statements made during voir dire. *Batson*, 476 U.S. at 96-97, 106 S.Ct. at 1723.

We do not find in the record clear-cut evidence either way. The defendants' claim that Juror No. 263's answers about the press were inconsistent appears weak: media coverage can be exploitative and accurate at the same time. The defendants' stated concerns about Juror No. 263's reaction to the Simi Valley verdicts appear to stand on firmer ground, but in at least one instance, the defense accepted without challenge a non-minority juror who professed to have been shocked by the Simi Valley verdicts, and who stated that she had anticipated on the basis of the Holliday video that at least one of the defendants in the state prosecution would be convicted. The record reveals that the defense attorneys engaged in far more vigorous questioning of Juror No. 263 than of the non-minority jurors who were questioned on the same day, although there are also suggestions in the record that those jurors may have appeared desirable to the defense for reasons other than race (e.g., positive contacts with or friends in law enforcement). Minority jurors questioned on previous days were subjected to vigorous voir dire by defense counsel; several non-minority jurors, however, were closely questioned as well. After the questioning on previous days, the defendants collectively or individually exercised against minority jurors two of the three peremptory challenges they ultimately used. A third minority juror, No. 598, initially was not challenged by the defense.

The evidence points in both directions. In such a situation, we must defer to the district court's factual findings: "'where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Hernandez*, 500 U.S. at 369, 111 S.Ct. at 1871 (plurality) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). We note that in this case the evidence was bound up at every stage with the need to make determinations of credibility. As the Supreme Court has explained,

> [i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of [that attorney's] state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 365, 111 S.Ct. at 1869 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985)). Here, the district court's observation of demeanor was particularly important, since the court had to assess not only the credibility of the attorneys, but also the credibility of those jurors who purported to have been reformed through the educative process of the voir dire. The two credibility assessments were interrelated: the more convincing the juror, the less believable the attorney who attempted to exercise the challenge.

Determinations as to lawyer credibility were clearly the crux of the matter in this case. As the Fifth Circuit recently noted in the context of a *McCollum* challenge, "the ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based." *United States v. Bentley-Smith*, 2 F.3d 1368, 1375 (5th Cir. 1993). Recognizing that on this most crucial issue, "[w]e have only a cold transcript to guide us while the trial judge was there to observe the jury selection--day in and day out," *Burks v. Borg*, Nos. 83-15263/16546, 1994 WL 280285 at *4 (9th Cir. June 27, 1994), we will not substitute our judgment for that of the district court.

2. *Juror No. 598*

The jury was sworn on February 22, 1993. On February 23, 1993, Koon's attorney informed the court that Juror No. 421, a reserve police officer who had been excused for cause, had contacted him: Juror No 421 had related to

Koon's attorney that Juror No. 598, a black woman seated on the jury, had made various disdainful comments to him regarding defense strategy and the racial composition of the jury. Koon moved to reopen the voir dire. The court summoned Juror No. 421.

In court, Juror No. 421 testified that when he had told Juror No. 598 that he felt she was "good jury material," she responded that the Simi Valley jury had been all white; that "they" (the defense attorneys) had managed to get all the blacks kicked off; and that they would most likely do the same in the federal trial.

Koon renewed his motion to reopen voir dire on the basis that the statements attributed to Juror No. 598 were inconsistent with her answers on the questionnaire and on voir dire. Koon also moved for a mistrial, and all defendants joined. The court took the motions under submission. The following day, the court denied the mistrial motions and informed counsel that it would consider a brief questioning of Juror No. 598.

On February 25, 1993, the court and all counsel met with Juror No. 598 in chambers, and the court questioned Juror No. 598 about Juror No. 421's allegations. Juror No. 598 denied them all. The court asked counsel if they had anything else. Only the government attorney replied, and he said that he had nothing. The in-chambers conference was adjourned. In open court, Wind again moved for a mistrial, and Briseno joined the motion. Koon and Powell did not. The motion was denied. The trial then commenced, with Juror No. 598 seated on the jury.

Appellants now argue that the district court erred because "it denied the defense the ability to exercise a peremptory challenge." Br. of Appellant Powell at 31. The record does not support this argument. Rather, the record reveals that Koon and

Powell simply dropped the issue after the *in camera* questioning of Juror No. 598.[23]

We therefore review the case for plain error affecting substantial rights. *United States v. Olano*, ___ U.S. ___, ___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); *United States v. Sterner*, 23 F.3d 250, 251 (9th Cir. 1994). Assuming without deciding that substantial rights were at issue here, we see no plain error. When a court is informed that a juror may have failed to disclose a relevant fact during voir dire, the proper course of action, once the jury has been sworn, is for the court to question the juror and excuse her if necessary, not to reopen the whole jury selection process. *See United States v. Berryhill*, 880 F.2d 275, 279 (10th Cir. 1989) (affirming conviction over defendant's contention that he was denied his right to exercise peremptory challenges, where information about jurors which should have been disclosed on voir dire was disclosed after first day of trial, and where district court questioned jurors, discharged one of the two, and seated an alternate), *cert. denied*, 493 U.S. 1049, 110 S.Ct. 853, 107 L.Ed.2d 846 (1990). The district court followed the procedure which has been endorsed by this court in cases of juror bias or misconduct, carefully questioning both the juror whose impartiality had been attacked and other relevant witnesses, and inviting counsel to do the same. *See United States v. Armstrong*, 909 F.2d 1238, 1244 (9th Cir.), *cert. denied*, 498 U.S. 870, 111 S.Ct. 191, 112 L.Ed.2d 153 (1990); *United States v. Sears*, 663 F.2d 896, 899-900 (9th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982). The district court found that Juror No. 598 was not biased, and nothing in the record establishes that that finding was clearly erroneous. We find no error here, let alone the plain error which warrants reversal where a claim has been abandoned below.

---

[23] Koon and Powell did not join in Wind's post *in camera* mistrial motion, although on other occasions when the same issue was raised, Koon and Powell jointed. RT 2/23/94 at 113.

G. *Prosecutorial Misconduct*

Appellants argue that several statements made by the prosecution during its rebuttal closing argument were improper and prejudicial. Because appellants did not make a contemporaneous objection to any comments they now challenge, we review their claims for plain error. *United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985). "A plain error is a highly prejudicial error affecting substantial rights." *United States v. Dischner*, 974 F.2d 1502, 1515 (9th Cir. 1992) (internal quotations omitted), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1290, 122 L.Ed.2d 682 (1993).

Prosecutors may not make comments calculated to arouse the passions or the prejudices of the jury. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S.Ct. 561, 566, 87 L.Ed. 734 (1943); *Commonwealth of Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486-87 (9th Cir. 1992). As the D.C. Circuit has stated:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984) (internal citations omitted), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); *see also Northern Mariana Islands*, 976 F.2d at 486-87; *United States v. Solivan*, 937 F.2d 1146, 1150-55 (6th Cir. 1991).

While recognizing that prosecutors may not appeal to the passions of the jury, in analyzing the effect of a comment upon the jury we accord due respect to the common sense of jurors. The Supreme Court has stated that

> [i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions [as "[t]he 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence"]. . . . [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974) (quoting *Miller v. Pate*, 386 U.S. 1, 6, 87 S.Ct. 785, 787, 17 L.Ed.2d 690 (1967)).

Appellants challenge several remarks made by the prosecution in its rebuttal closing argument. We examine each comment in turn.

Appellants first challenge statements telling the jury that they are "the conscience of the community."[24] An appeal to the jury to be the conscience of the community is not impermissible unless it is "specifically designed to inflame the jury." *United*

---

[24] Counsel stated:

> Judge Davies will give you your break, and then he'll instruct you in the law, and you will walk into the jury room to deliberate, and you will leave this courtroom, and convinced and confident with the truth, and you will leave with your collective good common sense, because ladies and gentlemen of the jury, *you're the conscience of the community. You decide what conduct is acceptable by your police. And what conduct violates the law.* Defendant Koon and the other defendants beat a man who was not combative, who was not an aggressor until he begged for mercy, knowing it was wrong. . . . *There are some countries where people can be beaten by the police until they beg the police to stop, but not in this country. Not now, not 200 years ago when this Constitution was written, and with your decision, not ever.*

RT 4/10/93 at 107-08 (emphasis added).

States v. Williams, 989 F.2d 1061, 1072 (9th Cir. 1993) (internal quotations omitted); *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984). In this case, when the prosecutor's statement is considered in context, it is clear that it was not designed to inflame the jury, but rather to explain to jurors that they were in the position to determine whether the charged conduct comported with community standards of reasonableness. The reference was not accompanied by any suggestion of the consequences of a particular verdict, nor did the prosecutor suggest to the jury that it had a direct stake in the outcome of the case. *See United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209, 103 S.Ct. 35-42, 77 L.Ed.2d 1391 (1983). The comment did not cross the line "demarcating permissible oratorical flourish from impermissible comment calculated to incite the jury against the accused." *Lester*, 749 F.2d at 1301 (quotations omitted).

Appellants also challenge the prosecutor's statement that the jury would have to decide what conduct is "acceptable by your police" and what conduct "violates the law." They contend that this statement suggested that the jury was obligated to decide more than just this case. We disagree. In order to decide whether appellants used unreasonable force, the jury was required to decide whether appellants' actions were acceptable or whether those actions violated the law. These comments did not place upon the jurors the burden of maintaining social order. They were not improper.

Appellants next challenge the prosecutor's reference to the Constitution, and contend that the prosecutor told the jury that the survival of the Constitution rested on their verdict. Again, we believe this ascribes an unreasonable meaning to the prosecutor's statements. A jury would interpret the prosecution's references the Constitution to assert that it is their job to interpret and apply the Constitution, and not as a statement that the Constitution will collapse if there were an acquittal. *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. The reference was within the bounds of advocacy permitted to the prosecutor.

Appellants also argue that the prosecutor invited jurors to convict appellants in order to influence the manner in which police officers are trained to use force. During closing argument, government counsel posed the rhetorical question:

> But the real question here is a little different. Knowing what you know about Sergeant Conta and about Sergeant Duke, which of those two officers would you want teaching recruits how much force can be used against the citizens of this community? That's the real question, and you know the answer.

RT 4/10/93 at 75.

We do not understand this comment to invite jurors to convict defendants in order to influence the manner in which police are trained. *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. The remark was made in response to defense closing arguments, in which counsel compared the testimony of Conta, the government use-of-force expert, and Duke, the defense use-of-force expert. Defense counsel had asked the jurors to consider which officer—Conta or Duke—they would prefer to call in the middle of the night when they needed help, and suggested that the jurors would prefer Duke. In the government's rebuttal, counsel compared the testimonies of Duke and Conta, and then made the challenged comment. In this context, a jury would understand the prosecutor's comments as a challenge to Duke's opinion regarding what is reasonable and unreasonable in the use of force. The comment was not improper.

The final comment to which appellants object is troubling. During the trial, the government had emphasized that appellants failed to write in their police reports that King was on the ground when most of the force was used, and argued that this omission occurred because appellants knew that the use of force was unreasonable. In response, defense counsel suggested that people often make mistakes about what they see and suggested that when the jury first saw the video, they noticed different things. On rebuttal, government counsel responded:

> Now, how does Mr. Stone explain the lies and omissions? Well, he tells you that everyone sees things differently. . . .
>
> When the video was played people may have noticed different details about what was occurring in he video, but there was one thing that everyone from Paris to Tokyo noticed, one thing that everyone saw. There was one thing that caused horror and outrage throughout this world. There was one thing that neither you nor anyone else missed when they saw that video tape. And the thing that everybody saw, that everybody was so outraged about was that the defendants were beating a man who was on the ground. That's why there was such outrage. That's why there was such uproar.

RT 4/10/93 at 81-82.

These remarks regarding the "horror and outrage" evoked from "Paris to Tokyo" by the Holliday video went beyond the bounds of appropriate advocacy and were improper. In this case, the worldwide broadcast of the Holliday videotape and the acquittal of appellants by the Simi Valley jury sparked widespread rioting and general public outrage of which the jurors could not help but be aware. In this context, the prosecutor's references to public outrage could easily incite the passions, fears, and prejudices of the jurors, remind them of the social ramifications of their verdict, and persuade them to convict the defendants for reasons irrelevant to appellants' guilt.

Even when a remark is improper, however, we can reverse only when the statement substantially prejudices a defendant's trial. *E.g., Territory of Guam v. Quichocho*, 973 F.2d 723, 727 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1014, 122 L.Ed.2d 162 (1993); *Lester*, 749 F.2d at 1301. While we certainly do not condone the government's behavior, we also cannot find that it constitutes plain error. We rely on several factors to reach this conclusion.

First, appellants have drawn a few sentences from a trial that lasted over a month and from detailed closing arguments

that lasted many hours. The remarks were not part of a series of improper comments by the prosecutor, but were in fact made in response to defense arguments: in using the phrase "Paris to Tokyo," government counsel merely was repeating a term previously used by defense counsel to attack King's credibility. *See Monaghan*, 741 F.2d at 1443 & n.42. The misconduct by the prosecution was partially invited, isolated, and of limited severity. *See Williams*, 989 F.2d at 1072; *Monaghan*, 741 F.2d at 1443.

Second, government counsel, defense counsel, and the district court all admonished the jurors to base their verdict only on the evidence before them, and to ignore what they knew about the first trial or what the possible ramifications of any verdict might be. The court also instructed the jurors to rely only on the evidence introduced at trial, and reminded them that oral argument is not evidence. Such instructions dilute the potential prejudice arising from improper statements. *E.g., Williams*, 989 F.2d at 1072; *Lester*, 747 F.2d at 1301; *United States v. Flake*, 746 F.2d 535, 542 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225, 105 S.Ct. 1220, 84 L.Ed.2d 360 (1985).

Third, unlike cases in which there is little evidence on which the jurors could base a conviction, in this case there was substantial independent evidence to support a finding of guilt. *See United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982). Finally, the verdicts acquitting two police officers and finding two guilty is indicative of the jury's ability to weigh the evidence without prejudice. *Monaghan*, 741 F.2d at 1443 n.45.

In light of these factors, we conclude that the jury's ability to weigh the evidence impartially was not materially affected by the prosecutor's improper remarks. *Cf. Williams*, 989 F.2d at 1072; *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986).

H. *Jury Instructions*

After closing arguments, the district court instructed the jury that the government had the burden of proving beyond a

reasonable doubt, *inter alia*, (1) that the conduct of the defendants deprived King of a right secured by the Constitution or other federal law; and (2) that the defendants acted willfully.

In the indictment, Powell, Briseno, and Wind were charged with depriving King of the right to be free from unreasonable force in the course of an arrest. Koon was charged separately under Count 2 with depriving King of "the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody." Consequently, with respect to deprivation of rights, the jury was given separate instructions as to Koon.

Koon contends that the instructions relating to deprivation of rights in his case were erroneous. Both Koon and Powell contend that the district court's instructions on willfulness were erroneous.

1. *Deprivation of Rights by Koon*

The district court instructed the jury as follows:

> Count 2 charges that Defendant Koon did willfully commit other officers to unlawfully assault Rodney King, who was then in the custody of those officers.
>
> The Fourteenth Amendment right to be kept free from the deprivation of liberty without due process of law includes the right to be kept free from an unreasonable use of force while in official custody. A police officer, having a right to arrest a person who has committed a crime, has an equal duty to protect that person from unreasonable assault or injury from any source while that person is in official custody. In other words, a police officer has a duty to insure that persons in official custody are not unreasonably assaulted by others, including police officers.
>
> A person is in official custody if, in light of all circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave.

RT 4/10/93 (Jury Instructions) at 15-16. The court then defined unreasonable force, concluding that "[t]he question is whether the totality of the circumstances justifies the force used during the arrest." *Id.* This is the test used to determine whether the force used in the course of an arrest is unreasonable in violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395-97, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).

Koon argues on appeal that the district court erred by drawing the definitions of both unlawful force and custody from the context of Fourth Amendment law, when the indictment charged him with depriving King of Fourteenth Amendment rights. According to Koon, the Fourteenth Amendment standard, which should have been applied in his case, affords greater protection to civil rights defendants, since under this standard, force is unlawful only if it is "shocking to the conscience" or "intended as punishment," rather than merely if it is "objectively unreasonable." Koon relies heavily on *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049, 111 S.Ct. 758, 112 L.Ed.2d 778 (1991), a criminal prosecution brought under 18 U.S.C. § 242, in which the Fourth Circuit held that the district court had erred by giving a *Graham*-type excessive force instruction where the victim was a pretrial detainee, and hence where the victim's right to be free from excessive force was governed by the Fourteenth Amendment. *Id.* at 788-89.

We must determine whether Koon, like the defendant in *Cobb*, was entitled to have the jury instructed under the Fourteenth Amendment standard. We review de novo the question of whether a jury instruction correctly sets forth the elements of a statutory crime. *United States v. Reese*, 2 F.3d 870, 883 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 928, 127 L.Ed.2d 220 (1994).

We conclude that the district court stated the law correctly. The indictment charged Koon with depriving King of Fourteenth Amendment rights. This circuit, like others, has recognized that a person in official custody has a right to be free from harm inflicted by third persons, and that an official who willfully subjects a custodial subject to a deprivation of that right is

subject to criminal liability. *United States v. Reese*, 2 F.3d at 887-90 (officials charged with violating victim's right to be kept free from harm while in custody); *United States v. McKenzie*, 768 F.2d 602, 604 (5th Cir. 1985) (same), *cert. denied*, 474 U.S. 1086, 106 S.Ct. 861, 88 L.Ed.2d 900 (1986); *United States v. Lynch*, 189 F.2d 476, 478 (5th Cir.) (officials charged with violating victims' right "not to be subjected to cruel and inhuman treatment or punishment while in custody, control, or under arrest"), *cert. denied*, 342 U.S. 831, 72 S.Ct. 50, 96 L.Ed. 629 (1951).[25]

The right of the custodial subject to be protected from harm is firmly rooted in substantive due process jurisprudence: "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsiblity for his safety." *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005-06, 103 L.Ed.2d 249 (1989).

---

[25] There is another route to police officer liability under the civil rights statutes for injuries perpetrated by third persons. Pursuant to a long line of civil cases, police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen. *E.g., O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986); *Brunner v. Dunaway*, 684 F.2d 422, 425-26 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983); *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981); *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972). In these cases, the constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows. Thus an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights.

The government chose not to rely on this line of authority in drafting the indictment, perhaps because *Byrd v. Brishke*, the leading case in this line, is explicitly premised on principles of tort liability. 466 F.2d at 10-11. We note that *Reese*, which was decided after the trial in this case, strongly suggests that *both* approaches are available in a criminal case. *See* 2 F.3d at 884 & n.20, 888-89.

In this circuit, that duty obtains not only when the victim is in custody, but also when the state has created the danger to which the victim is exposed. *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989) (victim in high crime area raped when police officer impounded car in which victim was passenger, leaving her stranded), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (prison nurse raped by violent sex offender assigned to work with her; state knew offender was likely to rape again, but did not tell nurse of his proclivities), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993).

The right which is established in these substantive due process cases is not the narrow right to be protected from constitutional wrongs committed by third persons. Rather, because the individual has been placed in a dependent and helpless position, she is entitled to the broader right to be protected from *harm*. In *Lynch*, in *Grubbs*, and in *Wood*, the third persons who inflicted the victims' injuries, in fact, were not state actors. They were private citizens whose own actions could not have given rise to liability under § 242 or § 1983. The state actors—the defendants who failed to intervene, or who created the danger—were alone responsible for *constitutional* crimes or torts. These cases make clear that the "harm" from which the custodial victim has a right to be protected is not necessarily an independent constitutional violation but rather need be no more than a common-law crime or tort. Thus in this case, there was no reason for the court to instruct the jury that Koon was liable only if he permitted third persons to inflict force which would amount to an independent Fourteenth Amendment violation shocking to the conscience. Indeed, such an instruction would have been erroneous.

The district court instructed the jury that King had a right to be kept from "an unreasonable use of force" while in custody—a Fourth Amendment standard. This was altogether correct. If Powell, Briseno, and Wind had inflicted only those injuries they were permitted to inflict as police officers subduing an arrestee—if they had used only reasonable force—there would have been no harm from which Koon was obligated to protect King.

Because the third-party actors were officers attempting to make an arrest, Koon's Fourteenth Amendment duties to the custodial subject were to protect against only such force as was unreasonable.[26]

This analysis finds support in *Reese*, where, as here, a police sergeant was convicted under 18 U.S.C. § 242 of violating the rights of custodial subjects by deliberately failing to intervene as his officers beat them. 2 F.3d at 887-88, The excessive force instruction given to the jury set forth a Fourth Amendment test of reasonableness under the circumstances--and was approved by this court. 2 F.3d at 891, 898-99. *Reese* thus recognized a custodial subject's substantive due process right to be protected from Fourth Amendment violations by third persons.

Koon attempts to distinguish *Reese* by arguing that it was permissible for the court to give a Fourth Amendment excessive force instruction there only because the indictment in that case left it unclear as to whether the defendants were charged under the Fourth or the Fourteenth Amendment. As we have explained, however, even in the context of an alleged deprivation of Fourteenth Amendment rights, it was altogether proper for the district court to use a Fourth Amendment excessive force benchmark when describing the harm an officer was obligated to

---

[26] That does not mean that Koon was criminally liable for *any* Fourth Amendment violation by the other officers. His criminal liability was premised on a *willful* failure to intercede. Thus if the blows had been struck so rapidly that Koon had no realistic opportunity to intervene, he would not be liable. *See O'Neill*, 839 F.2d at 11.

The district court recognized this point in its sentencing memorandum: Although the court suggested strongly that Briseno's stomp may have been a violation of King's Fourth Amendment rights, the court did not hold Koon accountable for that stomp, since it was so sudden that Koon could not have anticipated it. *Koon*, 833 F.Supp. at 779.

protect a custodial suspect from suffering at the hands of other police officers.[27]

Koon next contends that the jury should have been instructed that a person is in official custody only if he has been taken to "a police facility or other pretrial detention facility." But even assuming that the rights of all pretrial detainees to be free from excessive force are governed by substantive due process standards, this does not mean that a person has substantive due process rights only if he is a pretrial detainee. As in the § 242 cases cited above, King's right to protection arose when he came into custody—not when he was placed in a "facility."

The district court instructed the jury that a person is in official custody if, "in light of all circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave." RT 4/10/93 (Jury Instructions) at 16. Although this standard is taken from the Fourth Amendment case of *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), the same definition of "custody" applies in the Fourteenth Amendment context. Indeed Koon does not suggest any alternative "Fourteenth Amendment" definition of custody. He offers only the logically fallacious argument that because all pretrial detainees have substantive due process rights, a person must be a pretrial detainee to enjoy those rights.

In any event, Koon's custody argument is laid to rest by *Reese*, in which the court upheld a conviction based on the defendant's willful deprivation of a victim's right to be kept free from harm while in official custody, the only "custody" relevant

---

[27] Koon also points out that the defendants in *Reese* were charged with conspiracy, while he was not. The police sergeant in *Reese*, however, was charged with several substantive counts under 18 U.S.C. § 242 as well as with conspiracy under 18 U.S.C. § 241. The court upheld his conviction on both the conspiracy count and the substantive counts. 2 F.3d at 875, 877, 887-90.

to the counts on which defendant was convicted consisted of investigatory stops accompanied by pre-arrest scuffles between officers and suspects. 2 F.3d at 875, 877, 887-90. Since that much was clearly present in this case as well, the district court did not err by failing to tell the jury that it had to find more.[28]

2. *Willfulness*

The court gave the following instructions on willfulness:

[1] An act is done willfully if it is done voluntarily and intentionally, and with a specific intent to do something this law forbids; that is, with an intent to violate a protected right.

* * * * *

[2] In Count 1, the required specific intent is the intent to use more force than is reasonable under all of the circumstances.

[3] In Count 2, the required specific intent is the intent to refrain from protecting a person from an unreasonable use of force while that person is in official custody.

* * * * *

[4] It is not necessary for you to find that a defendant was thinking in constitutional terms at the time. You may find that a defendant acted with the required specific intent, even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved, provided that you find

---

[28] Koon also argues that there was insufficient evidence to sustain his conviction under Fourteenth Amendment standards of force and custody. Since the jury was properly instructed as to the Fourth Amendment definitions of those terms, and Koon does not argue that the evidence was insufficient to sustain a conviction under those standards, Koon's sufficiency of the evidence argument fails.

that the defendant intended to accomplish that which the Constitution forbids.

[5] The government may meet its burden, even if the defendant was motivated by fear, anger, or some other emotion, provided that the intent which I have described to you is present.

* * * * *

[6] The term "willfully" as used in these instructions to describe the alleged state of mind of a defendant means that he knowingly acted or failed to act deliberately and intentionally as contrasted with accidentally, carelessly or unintentionally.

RT 4/10/93 (Jury Instructions) at 17-20.

Appellants concede that ¶¶ 2 and 3 are correct statements of the law. They contend, however, that the effect of ¶¶ 4, 5, and 6 was to allow the jury to convict on the basis of acts which were merely volitional, rather than undertaken with the specific intent to violate King's rights. If appellants are correct, the problem is serious: "the violation of a federally protected right and the specific intent to violate that right are *separate* elements of the crime established by [§ 242]." *Reese*, 2 F.3d at 884 (emphasis in original).

We review de novo whether the district court has correctly stated the law as to the elements of the crime, but review the manner of expression for abuse of discretion. *Id.* at 883. We must decide whether the jury instructions, taken "as a whole are misleading or inadequate to guide the jury's deliberation." *United States v. Joetzki*, 952 F.2d 1090, 1095 (9th Cir. 1991).

Paragraph 4 is a correct statement of the law. While it may appear paradoxical to say both that a defendant must have the specific intent to violate the Constitution and that the defendant may have that intent even if he is not "thinking in constitutional terms," this seeming paradox is explained by the fact that "willfulness" encompasses "'reckless disregard of a constitutional requirement that has been made specific and definite.'" *Reese*, 2 F.3d at 881 (quoting *Screws v. United*

States, 325 U.S. 91, 105, 65 S.Ct. 1031, 1037, 89 L.Ed. 1495 (1945)); *see also United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1987). Indeed, the very language defendants complain of in ¶ 4 was approved by *Reese*.

Paragraph 5 is also correct. After noting that the government could meet its burden of proving specific intent even if a defendant was motivated by fear, anger, or some other emotion, the court reiterated that the government still had to prove "the intent which I have described to you." Since the court's earlier instruction defined specific intent correctly, this later instruction could not be incorrect unless the statement about motivation and emotions was somehow wrong. Appellants do not claim that it was.

Finally, ¶ 6 does not dilute the definitions of specific intent which appellants concede were correct. It simply makes clear that negligence or inadvertence do *not* amount to willfulness. This statement is far more helpful than hurtful to appellants.

We conclude that there was no error in the jury instructions.[29]

I. *Sufficiency of the Evidence to Support Powell's Conviction*

There is sufficient evidence to support a conviction if, "'reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

---

[29] Appellants also argue that in closing, the government misled the jury about the nature of the intent it was required to prove. The prosecutor stated that "[i]t is not, I repeat it is not, what these defendants think was reasonable. It is what a reasonable and ordinary police officer thinks is reasonable that is the standard you must employ." RT 4/10/93 (AM) at 99. That statement was made, however, "on the issue of reasonableness" of the force. *Id.* The statement did not refer to intent, which the prosecutor addressed earlier in his argument by reading from the instructions soon to be given by the court. The prosecutor kept specific intent (a subjective element) and reasonableness of the force under the Fourth Amendment (an objective element) quite distinct.

essential elements of a crime beyond a reasonable doubt.'" *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

Powell contends that the evidence was insufficient to establish either the unreasonableness of the force he used or his willfulness. On the first point, he focuses only on the force used from 1:07 to 1:26 in the videotape—the period in which the district court, in its sentencing memorandum, concluded that criminal conduct occurred. Powell points out that with respect to earlier portions of the videotape, the district court concluded that his blows were a reasonable response to King's movements. Powell then argues that since King moved again after being stomped on by Briseno, the blows he inflicted after that also were reasonable.

We reject this argument. In reviewing the sufficiency of the evidence, we are not bound by the district court's findings at sentencing. The comparison Powell draws between the earlier and the later portions of the videotape, since it is based on the district court's sentencing memorandum, is without force in this context. But even if that were not so, Powell's argument fails as a factual matter. The district court found that the movement of King's body after Briseno's stomp was involuntary. Powell does not contend that there was insufficient evidence for the jury to have made this same finding, or to have found that he was aware of the involuntary nature of King's movements. It is simply disingenuous to say that an involuntary movement in response to a stomp poses the same threat as a voluntary movement made in an attempt to resist arrest.

Powell also argues that the evidence was insufficient to show that his actions from 1:07 to 1:26 were willful. He points out that he was not found guilty of being an aider and abettor of Briseno. However, since the jury acquitted Briseno (because it found the stomp to be reasonable, or because it found the stomp not to be a willful use of unreasonable force, or form some other reason we know not of), the jury had no basis for convicting Powell of aiding and abetting Briseno. 18 U.S.C. § 2; *United States v. Powell*, 806 F.2d 1421, 1424 (9th Cir. 1986) (in order

to sustain an aiding and abetting conviction, "courts in this circuit, as in others, continue to require evidence showing that a principal offense has been committed—including requiring evidence that some principal had the requisite intent"). Yet the jury could still find that Powell willfully used unreasonable force in delivering the blows that followed Briseno's stomp.

The videotape and the testimony of the government witnesses who interpreted it provided ample evidence that Powell's conduct was unreasonable. The jury was instructed that it was permitted to infer "that a person ordinarily intends all natural and probable consequences of an act knowingly done." RT 4/10/93 (Jury Instructions) at 18. That inference was available here, and would allow the jury to infer that unreasonable force was intended. In addition, Powell's remarks to the dispatcher after King had been handcuffed, and his remarks to King at the hospital were in themselves sufficient to support a finding of willfulness.

J. *Sentencing Issues*

Appellants were sentenced under § 2H1.4 of the United States Sentencing Commission *Guidelines Manual*, the provision pertaining to violations of 18 U.S.C. § 242. Section 2H1.4 provides for a base offense level of either 10, or 6 plus the offense level applicable to "any underlying offense," whichever is greater. "Underlying offense" is defined as "any offense under federal, state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1." U.S.S.G. § 2H1.1, comment. (n.1).

In this case, the underlying offense was aggravated assault, which carries a base offense level of 15, U.S.S.G. § 2A2.2, to which was added 6 for a total of 21. The district court applied an upward adjustment of 4 for use of a dangerous weapon (U.S.S.G. § 2A2.2(b)(2)(B)), and a second upward adjustment of 2 for bodily injury (U.S.S.G. § 2A2.2(b)(3)(A)), for a total of 27.

The court declined to impose a four-level upward adjustment for serious bodily injury, because it found that King's serious injuries—a fractured leg, and head and facial injuries—

were sustained at a time when the officers were using lawful force. The court found that the force applied by the officers during the first 55 seconds of the Holliday videotape was a legitimate response to the threat King apparently posed. After 55 seconds, King became still. At 1:05, Briseno stomped on King's upper thorax, and King's body writhed involuntarily. Powell and Wind moved in and struck a new series of baton blows, between 1:07 and 1:26 on the videotape. These last blows, and these only, according to the district court, were unlawful. *Koon*, 833 F.Supp. at 779-80.

The district court departed downward five levels for victim misconduct and three levels based on a combination of other factors.[30] The government appeals from both of the downward departures and from the failure to adjust upward for serious bodily injury. We review de novo whether the district court had authority to depart. *United States v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (en banc). We review the factual findings concerning serious bodily injury for clear error. *United States v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992).

The Sentencing Commission has instructed courts to treat each guideline as carving out a "heartland," defined as the "set of typical cases embodying the conduct that each guidelines describes." U.S.S.G. Ch. 1, Pt. A, § 4(b). Departure may be warranted in cases falling outside the heartland—atypical cases "to which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Id.* The aggravating or mitigating circumstances which justify a departure must be circumstances of a kind or a degree "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s.

Both Congress and the Sentencing Commission have placed restrictions on the types of factors which may be considered in

---

[30] After the departures, the applicable range given a Criminal History Category of 1 was 30-37 months. Both appellants were sentenced to 30 months in prison.

sentencing. *E.g.*, 28 U.S.C. § 994(d); *see also* U.S.S.G. Ch. 1, Pt. A, § 4(b), intro. comment. We have frequently recognized that any sentence must be consistent with the structure of and the policies behind the federal sentencing statutes and the Guidelines. 18 U.S.C. § 3553(a); *United States v. Valdez-Gonzalez*, 957 F.2d 643, 647 (9th Cir. 1992); *United States v. Anders*, 956 F.2d 907, 914, (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1592, 123 L.Ed.2d 158 (1993).

1. *Three-Level Downward Departure*

The district court based the three-level downward departure on a combination of three factors: (1) the "additional punishment" appellants would receive on account of their unusual susceptibility to prison abuse and the administrative LAPD proceedings to which they would be subjected; (2) the extreme absence of a need to protect the public from future wrongdoing; and (3) the unfairness of successive state and federal prosecutions for the same conduct. The court recognized that none of these factors independently warranted a departure, but concluded that these factors taken together did justify a three-level departure. *Koon*, 833 F.Supp. at 786.

We do not quarrel with the district court's approach. Our circuit has recognized that although "[t]he [federal sentencing] statute speaks in the singular of 'mitigating circumstance,' ... [t]here is no reason to be so literal minded as to hold that a combination of factors cannot together constitute a mitigating circumstance." *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991). We have held that a "unique combination of factors" may constitute a "circumstance" that mitigates. *Id.; see also United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992), *and subsequently superseded*, U.S.S.G. § 5H1.12; *Anders*, 956 F.2d at 911-14.

However, although a district court may grant a departure based on a combination of factors that do not individually justify a departure, this policy does not permit the district court to consider in the mix factors that should not be part of the consideration. "[T]he factors that go into [a] complex must be those at least authorized, and certainly not expressly prohibited, by the Sentencing Guidelines." *Anders*, 956 F.2d at 914. For

this reason, we first consider individually each of the factors identified by the court to determine if each is an appropriate part of the mix.

As we examine each factor, our purpose is not to determine whether each factor taken alone justifies a departure, but rather whether consideration of the particular factor at all as part of the decision to depart is consistent with the structure and purposes of the Guidelines and the federal sentencing statutes. Were we to determine that these factors constitute permissible grounds for a departure, we would then consider whether, taken in combination, these factors constitute a circumstance that mitigates.[31]

a. *Additional Punishment*

In granting the three-level downward departure, the district court relied in part on the fact that appellants would be subject to "additional punishment" that flowed from their convictions in addition to the court-imposed sentence. This "punishment" involved two types: (1) the multiplicity of additional administrative proceedings to which appellants would be subjected, and (2) the anticipated abuse in prison because of appellants' particular vulnerability. *Koon*, 833 F. Supp. at 788-

---

[31] In our previous decisions considering departures based on a combination of factors, the district court has identified a *single* mitigating circumstance which unified these factors and justified a departure. For example, in *Floyd*, we found that a combination of factors - lack of education, imprisonment at age 17, and abandonment by parents - created the single mitigating circumstance of lack of youthful guidance. 945 F.2d at 1099 & N.2. Similarly, in *United States v. Fairless*, 975 F.2d 664 (9th Cir. 1992), we held that a combination of factors created the mitigating circumstance that the defendant's act of armed robbery was a single act of aberrant behavior. *Id.* at 666-69. In this case, by contrast, the district court did not suggest that the separate factors it identified combined to form a single mitigating circumstance, but instead identified three unrelated factors. Although we question whether the rationale we announced in *Cook* extends to cases in which a downward departure is based on a combination of *unrelated* factors we need not decide this issue because we conclude that none of the individual factors identified by the district court should have been considered in making the decision to depart.

89. The district court relied on separate analyses to justify these two types of "additional punishment."

i. *Additional Adversarial Proceedings*

The court recognized that, because of their convictions, appellants would be subjected to quasi-judicial administrative proceedings before the LAPD Board of Rights, resulting in appellants' loss of employment and tenure, their prospective disqualification from the field of law enforcement, and the anguish and disgrace of these deprivations. *Koon*, 833 F. Supp. at 789. The only case cited by the district court to support this departure is *United States v. Aguilar*, 994 F.2d 609 (9th Cir.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994), an opinion which has since been withdrawn and is no longer sound precedent.

As we have already noted, a district court may depart only "if the circumstance upon which it seeks to base its departure 'is consistent with the sentencing factors prescribed by Congress.'" *United States v. Pacheco-Osuna*, 23 F.2d 269, 271 (9th Cir. 1994) (quoting *Lira-Barruza*, 941 F.2d at 746.) Thus,

> [a]lthough § 3553(b) does not define the term "aggravating or mitigating circumstance," the term does suggest that a factor constitutes a permissible basis for departure *only if it speaks to the culpability of the defendant or the severity of the offense, or if it is otherwise related to some other congressionally-authorized legitimate sentencing concern.*

United States v. Crippen, 961 F.2d 882, 884 (9th Cir.) (emphasis added), *cert. denied*, ___ U.S. ___, 113 S.Ct. 438, 121 L.Ed.2d 358 (1992). "The list of factors relevant to sentencing includes the nature and seriousness of the offense, deterrence of criminal conduct, protection of the public from further crimes by the defendant, correctional treatment of the defendant, the history and characteristics of the defendant, . . . the need to avoid unwarranted sentencing disparities," promotion of respect for the law, and the provision of just punishment.

Pacheco-Osuna, 23 F.3d at 272; *see also Crippen*, 961 F.2d at 884; 18 U.S.C. § 3553(a).

In *United States v. Alvarez-Cardenas*, 902 F.2d 734 (9th Cir. 1990), we considered whether the fact that a defendant faced a threat of deportation was an appropriate fact to consider at sentencing. Reasoning that the threat of deportation was not a circumstance that spoke to the offense in question or to the offender's character, we concluded that the threat of deportation was irrelevant for sentencing purposes. *Id.* at 737. We subsequently noted that the threat of deportation did not fall within any of the sentencing factors set forth by Congress in § 3553(a). *Cripen*, 961 F.2d at 885.[32] Since our decision in *Alvarez-Cardenas*, we have refused to permit departures based on factors that do not speak to the offender's character, the nature or seriousness of the offense, or some other legitimate sentencing concern. *See United States v. Ullyses-Salazar*, 28 F.2d 932, 938 (9th Cir. 1994) (deterrence of government misconduct that has not persuaded defendant to break the law is not an appropriate ground for a departure); *Pacheco-Osuna*, 23 F.2d at 272 (same); *United States v. Williams*, 978 F.2d 1133, 1136 (9th Cir. 1992), *cert. denied*, ___ U.S., 113 S.Ct. 1606, 123 L.Ed.2d 168 (1993) (same).[33]

---

[32] We also noted that the Sentencing Guidelines suggest that departures from the sentencing range prescribed by the Guidelines generally reflect the defendant's culpability and the seriousness of the offense. *Compare* U.S.S.G. § 5K2 (listing as grounds for departure factors based on the characteristic of the crime or on characteristics particular to the defendant's culpability or danger to society) *with* U.S.S.G. § 5H1 (factors that speak to the defendant's personal characteristics or to his status are generally not proper grounds for a departure).

[33] In stating that factors that speak to the nature and seriousness of the crime or to the offender's culpability are relevant to sentencing and to departure, we do not intend to imply that factors that do not speak to these issues are *never* relevant. *See Crippen*, 961 F.2d at 885 ("We do not mean to suggest that only factors which bear upon a defendant's personal history or upon the crime in question may be considered in sentencing. Courts may depart for other aggravating or mitigating circumstances"); U.S.S.G. Ch. 1, Pt. A, § 4(b) (with

[Footnote continued on next page]

Personal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors. They are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes.

Contrary to the district court's assumptions, sentences imposed under the Guidelines do not impose the only consequence of committing a crime, nor is it intended that they be the only consequence. To the contrary, the societal consequences that flow from a criminal conviction are virtually unlimited. Individuals may lose their jobs or be foreclosed from serving in future professions; their marriages are destroyed; they may be plunged into poverty. Some individuals may be deported, *see United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990), while those who have been convicted of drug or racketeering offenses may lose their homes and their investments to the federal government in forfeiture proceedings. World class figure skaters may lose the right to compete in international competition. Virtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities.

All of these consequences could be considered "additional punishments" that flow from conviction, yet seldom can one conceive of a situation in which these consequences form an appropriate basis for granting a departure. This is so because the criminal justice system cannot and does not attempt to be the

---

[Footnote continued from previous page]

the exception of certain listed factors "that the court cannot take into account as grounds for a departure . . . the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."). We note only that "for a factor to be considered, it must be tied to *some* legitimate penological purpose or legitimate sentencing concern expressed in the Sentencing Reform Act." *Crippen*, 961 F.2d at 885. In most cases, these factors will speak to the nature and seriousness of the defendant's crime or to his culpability.

sole arbiter of the consequences of criminal acts. To permit the system to assume such a role would create a system of sentencing that would be boundless in the moral, social, and psychological examinations it required courts to make. *See United States v. Walker*, 27 F.2d 417, 419 (9th Cir. 1994) (refusing to hold that post-arrest emotional trauma is a valid ground for a departure and noting that if it did, every arrestee would request a departure on that basis and that courts would be powerless to separate the valid claims from the invalid). Given the range of possible "additional punishments" that a court might consider when sentencing, the district court's suggested approach can only lead to huge disparities in sentences, thereby conflicting with one of the overriding purposes of the Sentencing Guidelines: the reduction of sentencing disparities between individuals who have committed equivalent crimes. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(f). A related concern is the ease with which this factor can be used to justify departures that are based, either consciously or unconsciously, on the defendant's socioeconomic status, a factor that is *never* a permissible basis for a departure. *See* U.S.S.G. § 5H1.10.

As a final matter, the consequences of conviction identified by the court as a basis for downward departure are troubling because they stem from the fact that appellants, as police officers, held positions of trust and respected status in society and have abused this trust. *See Koon*, 833 F. Supp. at 789 ("[i]n short, because Koon and Powell are police officers, certain unique burdens flow from their convictions"). Rather than reducing a punishment for such individuals, the Guidelines would enhance the punishment, viewing persons who abuse their positions of trust as more culpable than those offenders who do not hold such a position. U.S.S.G. § 3B1.3 comment. (backg'd).

In sum, we conclude that the district court's reliance on the "additional punishment" flowing from appellants' criminal conviction was impermissible.

ii. *Extreme vulnerability to prison abuse*

In addition to relying on the "additional punishment" that flows from criminal conviction, the district court considered as "additional punishment" appellants' potential extreme vulnerability to abuse in prison. The court noted that the "widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the defendants' status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration." *Koon*, 833 F. Supp. at 788. In justifying this basis for the departure, the district court relied on two opinions from the Second Circuit which affirmed a downward departure based on the defendant's "extreme vulnerability" to prison abuse. *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

In *Lara*, the Second Circuit upheld a departure where the defendant had previously been victimized "as a consequence of his diminutive size, immature appearance and bisexual orientation," and the only way to protect him was to place him in solitary confinement. 905 F.2d at 601. The court held that although the Sentencing Commission had considered the vulnerability of offenders to physical attack in prison when it formulated the Guidelines, *see* 28 U.S.C. § 994(g), it did not consider vulnerability to the extent present in the case before it—"where the only means for prison officials to protect [the defendant] was to place him in solitary confinement." *Id.* at 604. The Second Circuit subsequently extended this analysis in *Gonzalez*, where it approved a downward departure for a defendant who was small, feminine-looking, and had the appearance of a fourteen year old, even though there was no history of prior prison abuse and no indication that the defendant would be placed in solitary confinement. 945 F.2d at 526-27.

Although our circuit has never upheld a downward departure on the grounds of extreme vulnerability to prison abuse, we have implied that such a departure might be appropriate in certain circumstances. *United States v. Martinez-*

Guerrero, 987 F.2d 618, 620 (9th Cir. 1993). However, the extension of the Second Circuit's cases to appellants' case is problematic because appellants' vulnerability rests solely on their status as police officers and on the public outrage that their crime engendered. In contrast, in *Martinez-Guerrero*, we understood the Second Circuit's cases to rely primarily upon the defendant's *physical* characteristics, including the individual's age, mental condition, and the existence of physical impairments. *Id.* at 620-21; *see also* U.S.S.G. §§ 5H1.1, 5H1.3, 5H1.4. We agreed that an extraordinary physical impairment might provide a reason for a departure but concluded that legal blindness did not constitute such an impairment. *Id.*; *see also United States v. Garza-Juarez*, 992 F.2d 896 (9th Cir. 1993) (affirming downward departure based in part on serious mental disorder that causes defendant to suffer from panic attacks with agoraphobia), *cert. denied*, ___ U.S. ___, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994); *United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992) ("an extraordinary physical impairment that results in extreme vulnerability is a legitimate basis for departure").

Thus, although we have recognized the possibility of basing a departure on an extraordinary physical impairment, we have never extended this analysis to include departure based on an individual's occupation or his notoriety. We decline to do so today on the grounds that in this case such a departure would be inconsistent with the structure and policies of the Guidelines.

Although it is true that police officers, as a group, are unpopular with prison inmates and are vulnerable to abuse in prison, the reliance *solely* on hostility toward a group of which the defendant is a member provides an unlimited open-ended rationale for departing. While a departure based on U.S.S.G. § 5H1.4 involves the relatively objective question of whether an extraordinary physical impairment exists, the determination of whether an individual's membership in a group regarded with hostility leaves him vulnerable is both subjective and open-ended. Nothing would prevent this rationale from being applied to numerous groups—such as gang members who may face increased abuse from members of a rival gang, police informants, or child abusers—all of whom face an increased risk

of abuse in prison. Because the number of defendants who might qualify for this departure is virtually unlimited, acceptance of this basis for departure would subvert the Guidelines' goal of reducing unwarranted disparities in sentencing. 18 U.S.C.A. § 3553(a)(6).[34]

Extension of the Second Circuit's cases to appellants' case is troubling for another reason as well. Unlike the physical vulnerability cases in which the departure is grounded on factors over which the defendant has little or no control, in this case the vulnerability to prison abuse arises directly from the public's awareness of appellants' crime. Any public outrage was the direct result of appellants' criminal acts. It is incongruous and inappropriate to reduce appellants' sentences specifically because individuals in society have condemned their acts as criminal and an abuse of the trust that society placed in them. We therefore conclude that a downward departure based on public outrage over the crime that was committed is contrary to the Guidelines' goals of promoting respect for the law and imposing sentences that reflect the seriousness of the crime. *See* 18 U.S.C.A. § 3553(a)(2)(A).[35]

---

[34] Contrary to the situation in *Lara*, nothing in the record suggests that appellants must be placed in a continuous solitary confinement in order to protect them from abuse in prison. We are not faced with a situation in which the punishment imposed by the criminal justice system is far harsher than ordinary, and thus we do not decide whether a downward departure in such a situation is permissible.

[35] We recognize that this case received exceptional media coverage and that the Holliday videotape was viewed worldwide. Thus, contrary to most cases in which a police officer stands accused of unlawfully depriving a citizen of her civil rights, the entire world was aware of the arrest of Rodney King. The district court was therefore correct that the publicity and emotional outrate that have surrounded this case are exceptional. However, such a fortuity is an insufficient basis for granting a downward departure.

b. *Absence of a Need to Protect the Public*

The second factor relied on by the district court in granting the three-level downward departure is the absence of any need to protect the public from future misconduct by appellants. *Koon*, 833 F. Supp. at 789-90. The district court reasoned that the federal sentencing statutes require it to consider the need to protect the public from further criminal activity, *see* 18 U.S.C. § 3553(a)(2)(C), and concluded that because neither Koon nor Powell is dangerous or likely to engage in future criminal conduct, the sentence imposed need not reflect the need to protect the public. *Id.* at 790.

In its opinion, the district court recognized that the Guidelines consider the need for public protection by factoring a defendant's criminal history into the calculation of the sentence. *See* U.S.S.G. Ch. 4, Pt. A, intro. comment. Thus, the Guidelines specifically provide that first-time offenders like Koon and Powell should be classified in Criminal History Category 1, U.S.S.G. §§ 4A1.1, 4A1.3, Ch. 5, Pt. A. However, the court reasoned that

> Koon and Powell fall into the lowest criminal history category, along with first-time offenders who may manifest a violent nature or a potential for recidivism. Within Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly likely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent "to a degree" not contemplated by the Guidelines.

Koon, 833 F. Supp. at 790 n. 20.

We are sympathetic to the district court's belief that appellants' low likelihood of recidivism should be relevant in fashioning a sentence. However, the fact that appellants are neither dangerous nor likely to commit crimes in the future is not an appropriate basis for a departure in this case. Although it is true that some offenders who are classified in Criminal

History Category I have a greater likelihood of recidivism than appellants, the Commission already took this factor into account when it drafted the Guidelines, which provide:

> The lower limit of the range for a Category I criminal history is set for a first time offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.

U.S.S.G. § 4A1.3, p.s.

Thus, the Commission has expressly disapproved of sentencing courts' departing below the range for the category that already reflects the lowest risk. This is so even for defendants who may be unusually unlikely to commit crimes in the future. For this reason, a downward departure based on these grounds is inconsistent with the Sentencing Guidelines. *See United States v. Farah*, 991 F.2d 1065, 1070 (2d Cir. 1993); *United States v. Mogel*, 956 F.2d 1555, 1563 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 167, 121 L.Ed.2d 115 (1992).[36]

c. *Successive State and Federal Prosecutions*

The third and final factor cited by the district court in granting a three level departure is the "spectre of unfairness" and the burden on the defendants created by successive state and federal prosecutions. *Koon*, 833 F. Supp. at 790. As the district court properly recognized, the federal prosecution of Koon and Powell did not violate the Fifth Amendment's prohibition against double jeopardy: under the doctrine of "dual sovereignty," the state and federal governments may each prosecute an individual for the same act when the act violates

---

[36] In a similar context, we have relied on these policy statements in the Guidelines to hold that a downward departure from Criminal History Category I cannot be based on the defendant's "absolutely clean prior record." *United States v. Berlier*, 948 F.2d 1093, 1095 (9th Cir. 1991).

each sovereign's respective laws. *Heath v. Alabama*, 474 U.S. 82, 89, 106 S.Ct. 433, 437, 88 L.Ed.2d 387 (1985). However, the court concluded that the federal conviction following a state acquittal raises a "spectre of unfairness" that imposes unique burdens on appellants and supports a downward departure. *Koon*, 833 F. Supp. at 790.

Reliance on the "spectre of unfairness" of dual prosecutions to support a departure is improper because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern. *See Crippen*, 961 F.2d at 884. To the contrary, application of this factor directly conflicts with the court's mandate to impose a sentence that "reflect[s] the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). Once the state has prosecuted an individual for a criminal act, the federal government will undertake a successive prosecution only when the Attorney General decides that the earlier state prosecution did not vindicate "compelling [f]ederal interests." *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979). In this case, the Attorney General's authorization of a federal prosecution necessarily reflected the conclusion that the distinct federal interests in protecting the constitutional rights of citizens to be free from unreasonable force at the hands of government had not been adequately vindicated in the state court proceeding. To *reduce* a sentence in these circumstances is in direct conflict with the Guidelines. We find nothing in the structure or policies of the Guidelines to support a departure on the grounds that successive prosecutions are burdensome. *See United States v. Woodard*, 927 F.2d 433, 435 (8th Cir.) (rejecting argument that prior state prosecution for same conduct should lead to a more lenient sentence), *cert. denied*, ___ U.S. ___, 112 S.Ct. 246, 116 L.Ed.2d 201 (1991).

In sum, we conclude that consideration of any of the factors identified by the district court to support the three-level departure, separately or collectively, is, under the facts of this case, inconsistent with the structure and policies of the Guidelines. These factors are improper grounds on which to rest a departure.

2. Five-Level Downward Departure

In support of the five-level departure, the district court cited U.S.S.G. § 5K2.10, p.s., which states that a court may sentence below the Guidelines range "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." The government contends that departing on this basis was erroneous because, generally speaking, victim misconduct does not remove a criminal prosecution against a police officer from the heartland of cases to which 18 U.S.C. § 242 and U.S.S.G. § 2H1.4 apply. The government observes that police officers as part of their job must interact on a regular basis with persons who break the law; victim misconduct is the norm, not the exception. The government also points out that police officers, unlike civilians, are carefully trained on how to respond appropriately to misconduct, and how to avoid becoming provoked and overreacting; hence, the government argues, provocation is less exculpatory in a police misconduct case.

A close examination of the district court's sentencing memorandum reveals that the court ultimately did not conclude that appellants were provoked in precisely the manner contemplated by § 5K2.10. The guidelines requires that the victim's wrongful conduct "contributed significantly to provoking the offense behavior." After summarizing King's misconduct—speeding, driving while intoxicated, fleeing in his car from pursuing officers, refusing to obey the officers' commands to get on the ground and remain prone, attempting to escape from police custody, charging Powell—the court acknowledged that

> Mr. King's provocative behavior eventually subsided. The Court recognizes that by the time the defendants' conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger.

Koon, 933 F. Supp. at 787. The court concluded that King's wrongful conduct was "[t]he *initial* provocation for the subsequent course of events," that "the defendants' *early* perception of Mr. King as dangerous was reasonable," and that

Koon and Powell "at least *initially*[] were invited to use force." *Id.* at 786-87 (emphasis added). The court found that many of the factors which are relevant in determining the extent of departure under § 5K2.10—features which the district court also viewed as relevant in deciding whether to depart at all, *id.*, at 787 & n.13—weighed in favor of appellants with respect to appellants' *initial, lawful conduct*. But the court found that these factors were no longer present when appellants' conduct became criminal. The court recognized that by the time Powell struck, and Koon permitted to be struck, those blows for which appellants were criminally liable, King no longer presented a danger, no longer reasonably appeared to present a danger, and was no longer persisting in misconduct. *Id.* at 787; *see* U.S.S.G. § 5K2.10(b)-(d).

The district court thus determined not that King's misconduct "provoked" the offense conduct—the "provocative" behavior had "subsided" before appellants committed their criminal acts—but rather that "the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King's initial misconduct." *Koon*, 833 F. Supp. at 787. "But-for" causation, however, is not the proper analysis under § 5K2.10. But-for causation is a much less demanding standard than provocation; indeed, such a standard does not require victim misconduct at all. By relying on the concept of but-for causation, the district court implicitly recognized that § 5K2.10 does not apply, at least not in the usual sense.

After concluding that King's provocative behavior had subsided before appellants committed the offense conduct, the district court provided the following justification for the departure:

> Because the defendants were convicted of violation of 18 U.S.C. § 242, Guideline Section 2H4.1 for interference with civil rights under color of law, and Guideline Section 2A2.2, for aggravated assault linguistically apply. However, Mr. King's wrongdoing and the substantial role it played in bringing about the defendants' unlawful conduct remove this case from the "heartland" of offenses contemplated by the aggravated

assault Guideline. *See* Guidelines, Ch. 1, Pt. A, § 4(b).

Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force.

The two situations are clearly different. Police officers are always armed with "dangerous weapons" and may legitimately employ those weapons to administer reasonable force. Where an officer's initial use of force is provoked and lawful, the line between a legal arrest and an unlawful deprivation of civil rights within the aggravated assault Guideline is relatively thin. The stringent aggravated assault Guideline, along with its upward adjustments for use of a deadly weapon and bodily injury, contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for differences between such "heartland" offenses and the case at hand.

The criminal conduct of a state officer who launches an unprovoked assault on an individual in custody is dissimilar to the conduct of defendants Koon and Powell who, at least initially, were incited to use force. Consistent with the policy of the Guidelines, the sentence imposed must reflect this disparity.

Koon, 833 F. Supp. at 787.

The district court ultimately focused not on provocation itself but rather on the volatility of the incident, and the close proximity between, on the one hand, the victim's misconduct

and the officers' concomitant lawful use of force, and, on the other hand, the appellants' unlawful use or authorization of the use of force. We must determine whether this basis for departure—as opposed to a more straightforward application of § 5K2.10—is legally permissible.

We begin by noting that in *Graham v. Connor*, the Supreme Court, in formulating the test for the evaluation of excessive force claims under the Fourth Amendment, recognized that

> [t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

490 U.S. at 396-97, 109 S.Ct. at 1872. Thus *before* a use of force can be found excessive, the *Graham* "calculus," embracing the very factor which the district court found to be unusual in this case—the "dynamic arrest situation""—has been taken into consideration. The quoted language from *Graham* was included in the jury instructions in this case, and was reiterated by the government in closing. The incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by the victim in a situation where an officer must act instantly is typical--not unusual.

This case differs in one respect from many of the cases in which the *Graham* standard has been applied. The bulk of those cases are civil. In this criminal prosecution, in addition to proving that Powell used and Koon permitted officers under his command to use excessive force, the government was required to prove beyond a reasonable doubt that appellants intended to subject King to a deprivation of his civil rights. This required the jury once again to take the *Graham* factors into account, and required the government to make the difficult showing that appellants *willfully* came down on the wrong side of the *Graham* standard. **Thus the feature which the district court found unusual, and exculpatory, is built into the most fundamental structure of excessive force jurisprudence, and in criminal cases is built in twice.**

The district court was troubled by the fact that U.S.S.G. § 2H1.4 applies both to excessive force cases of the *Graham* variety and to cases in which a law enforcement or corrections officer applies force which is unlawful from the beginning. The district court saw the appellants' lawful authority to use or allow the use of *some* force, and what it perceived as the slenderness of the line between legitimate and illegitimate force, as factors partially exculpating appellants. Section 2H1.4, however, adopts exactly the opposite approach. The guideline punishes those vested with governmental authority *more* severely than private actors who are guilty of comparable conduct: this is the reason the guideline starts with the "underlying" offense and then increases the offense level by 6. *See* U.S.S.G. § 2H1.4, comment. (backg'd); *see also* U.S.S.G. § 3B1.3, comment. (backg'd). The fact that appellants were authorized to use *some* force in this case does not mitigate the fact that they used too much. Under the structure and policies of the Guidelines, it makes it worse.

In a great many § 242 cases, the defendant has authority to use appropriate force. The district court's rationale for departure in this case was that here, due to the victim's misconduct, the officers were legitimately called upon to use force *in this particular incident*, and that the incident itself was so volatile that legal force quickly became illegal. But the policy behind the punitive structure of § 2H1.4 does not apply any less to an officer who crosses the line into illegality *after* he begins to apply force to a victim than it does to the officer who crosses that line *as soon as* he begins to hurt the victim. The policy behind the guideline applies with equal or greater force in the former case; the victim who is a wrongdoer is especially vulnerable to abuses by officials, because the legitimate sway of authority over him is greater to begin with. The structure of § 2H1.4 suggests that the slenderness of the line separating legal from illegal uses of state power is a reason for victims, and for

society, to be especially concerned. It cannot at the same time be a reason to partially excuse those who transgress.[37]

As justification for the five-level departure, the district court relied not only on the conclusion that appellants' offense conduct fell outside the heartland of § 2H1.4 cases, but also on the conclusion that it fell outside the heartland of *aggravated assault* cases (i.e., § 2A2.2). "The stringent aggravated assault Guideline . . . contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for differences between such 'heartland' offenses and the case at hand." *Koon*, 833 F. Supp. at 787. The district court thus drew an implicit contrast between appellants and *civilian* offenders, noting that "Koon and Powell did not seek out a victim; rather, their very presence at the scene was a consequence of Mr. King's wrongful conduct." *Id.* Similarly, the court noted that "[p]olice officers are always armed with 'dangerous weapons'"—thereby suggesting that

---

[37] The fact that § 2H1.4, like § 242, encompasses different kinds and degrees of misconduct is in itself insufficient to justify a downward departure. *See United States v. LeBlanc*, 24 F.2d 340, 347 (1st Cir. 1994) (although money laundering offenses which stem from prior unlawful activity of running an illegal gambling business differ from the "classic" offense of laundering drug money, downward departure is impermissible because the offense at issue falls within the plain language of the statute and clearly was intended to be reached by Congress.) Appellants' conduct fell squarely within § 242; the statute criminalizes the deprivation of *all* Constitutional rights. *United States v. Price*, 383 U.S. 787, 8003, 86 S. Ct. 1152, 1161, 16 L.Ed.2d 267 (1966) (discussing legislative history). Hence "once a due process right has been made specific by court decisions, that right is encompassed by § 242." *United States v. Langer*, 958 F.2d 522, 524 (2d Cir. 1992) (internal quotation marks and citations omitted). The rights King was deprived of have been clearly established for decades, and willful conduct which deprived him of those rights falls within the heartland of both the statute and the Guidelines. The fact that willful violators of the rights at issue in this case may not be prosecuted as often as other violators of § 242 does not alter the analysis. In itself it says nothing about individual culpability, although it may say something about evidentiary difficulties and about the litigation strategies of the federal government.

application of the weapons enhancement may be unfair in a case where the defendant is a police officer rather than a civilian. *Id.*

But to depart because of a perception that this case falls outside the heartland of aggravated assault cases again subverts the structure of § 2H1.4. That guideline explicitly enhances sentences for official misconduct *beyond* those for civilian misconduct. The Sentencing Commission cannot have been blind to the fact that the circumstances out of which official misconduct arises are different from the circumstances which give rise to civilian misconduct. The Commission, in fact, recognized those differences and used them as the basis for harsher rather than more lenient punishment.

We conclude that the district court's rationale for departing downward is flawed. The court isolated as unusual a factor which is at the very heart of excessive force jurisprudence. The court also adopted an approach toward official misconduct which is antithetical to the approach embodied in the applicable guideline. The five-level downward departure was not justified.[38]

3. *Failure to Adjust Upward Four Points for Serious Bodily Injury*

The district court imposed a two-level upward adjustment for bodily injury under U.S.S.G. § 2A2.2(b)(3)(A), rather than a

---

[38] We do not conclude that a departure for victim misconduct would *never* be permissible in a public case. Such a departure might be appropriate, where, for example, the victim kills or wounds an officer's partner in his presence. In such a case, victim misconduct plays a role similar to that played by provocation in the more usual crimes of passion: the defendant is to a certain extent excused because he was seized by passion, and acted in the heat of the moment. This appears to have been the rationale in those cases where departures under § 5K2.10 were affirmed. *See United States v. Tsosie*, 14 F.3d 1438 (10th Cir. 1994); *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989) (assaults triggered by sexual jealousy or humiliation). This is distinguishable from the district court's rationale, which relies on the vicissitudes of police work, and the difficulty in drawing the line between proper and improper uses of force.

four-level adjustment for serious bodily injury under U.S.S.G. § 2A2.2(b)(3)(B). The government argues that the latter adjustment is warranted by the blow, administered by Powell 43 seconds into the videotape, which fractured King's leg. The district court acknowledged that this blow caused serious bodily injury, but found that Powell was not acting criminally when he delivered it.

As the government points out, the district court left it unclear whether or not the blow in question constituted excessive force: the court found that the blow "may have been tortious," 833 F.Supp. at 778, but concluded that Powell was not *criminally* liable for the blow, because the court was unable to find that he had intended at that time to use excessive force.[39] *Id.* It is the latter conclusion which the government attacks on appeal.

The district court supported its findings with the following observations: (1) blows to the leg joints are within LAPD policy, if necessary to avert a threat; (2) preceding the blow, the situation had evolved rapidly, and (3) King had tried to rise; (4) even as Powell delivered blows around the time of second 43, King continued to move, and to resist attempts to place him into the felony-prone position. *Id.*

The government contends that these reasons cannot be sustained, and musters countervailing evidence of its own: (1) there is a presumption that people who use unreasonable force know that it is unreasonable; (2) both Koon and Powell showed an awareness of wrongdoing after the event (by lying and by bragging); 3) Koon and Powell had been taught not to use a baton on a suspect, unless the suspect is combative or aggressive; and (4) there is no reason to distinguish the leg-breaking blow from the later blows which th court found *were* criminal.

---

[39] The district court made the same finding with respect to Koon's criminal liability for the leg injury, and for the same reasons. *Koon*, 833 F.Supp. at 779-80. In the remainder of this discussion, references to Powell's liability refer to Koon's as well.

None of these arguments establishes that the district court committed clear error.

First, the district court was not bound to embrace the presumption which the government contends should apply. The court's specific findings of fact override general presumptions.

Second, the fact that Koon and Powell may have been conscious of guilt does not show *when* their criminal wrongdoing occurred. Their lies and boasts may have been directed to the later conduct which the district court found was criminal, and not to the earlier conduct. The later blows caused only soft tissue bruising.

Even if Powell's most damaging blow was not authorized by LAPD policy, this does not mean that Powell necessarily intended to use unreasonable force. Police department policy permitted blows to forestall aggressive or combative behavior, and the district court found that King was continuing to move at the time. While such movement may not in fact have been aggressive, it may have appeared so. Powell's reaction could reasonably be found to be an error of judgment rather than an intentional use of excessive force.

Finally, the district court provided a reason to distinguish between the officers' intent at the time of the leg-breaking blow and their intent during the 19 seconds of the videotape in which the court concluded that criminal activity occurred. Those latter 19 seconds were preceded by a period in which King lay on his stomach, and posed no threat. *Koon*, 833 F.Supp. at 777. The court found no comparable period of compliance preceding the leg-breaking blow.

The government quarrels with the evidentiary basis for this latter finding, and contends that both the Holliday videotape and the testimony of government witnesses establish that King ceased to pose a threat, at the very latest, 30 seconds into the tape. But the defense witnesses testified that King continued to pose a threat at that time. The district court concluded that the videotape was "sometimes an ambiguous record of the crucial events," *id.* at 776, and the conflicting testimony at trial bore this out. Although we may not agree, the district court resolved

those ambiguities in favor of the defense. Its resolution was not inconsistent with the verdicts, and the government has not established clear error.

CONCLUSION

We affirm appellants' convictions. After a careful review of the record and the relevant authorities, we are convinced that the district judge correctly resolved each of the legal issues raised by appellants as to the guilt phase of the proceedings. He conducted the trial with impeccable fairness and careful and thoughtful attention to its every aspect. We appreciate the magnitude of the task, given the unusual number of complexity of the issues involved, and the difficult circumstances caused by the extraordinary publicity surrounding every phase of the proceedings. However, we are also convinced that the sentences imposed by the district court are inconsistent with the structure and policies of the Sentencing Guidelines and the federal sentencing statutes, and we therefore vacate the sentences and remand for resentencing consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING.

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Stacey C. KOON, Defendant-Appellant, Cross-Appellee.

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Laurence M. POWELL, Defendant-Appellant, Cross-Appellee.

Nos. 93-50561, 93-50608, 93-50562 and 93-50609

United States Court of Appeals,
Ninth Circuit.

Filed January 12, 1995
Amended February 2, 1995

ORDER AND AMENDED DISSENT AND CONCURRENCE

Before: BROWNING and FLETCHER, Circuit Judges, and FITZGERALD,* District Judge.

All of the panel members have voted to deny the petitions for rehearing of both defendants.

---

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Judge BROWNING and Judge FLETCHER have voted to reject the suggestions for rehearing en banc of both defendants and Judge FITZGERALD has so recommended.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote as to whether to take the case en banc. A vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court. Judge Trott was recused.

The petitions for rehearing of both defendants are denied and the suggestions for rehearing en banc of both defendants are rejected.

REINHARDT, Circuit Judge, dissenting, with whom PREGERSON, WIGGINS, KOZINSKI, NOONAN, and HAWKINS, Circuit Judges, join, and with whom O'SCANNLAIN, T.G. NELSON, and KLEINFELD, Circuit Judges, join, except as to Part IV:

REINHARDT, Circuit Judge, dissenting.

I dissent from the refusal to rehear this case en banc. While I agree that there is no prejudicial error that requires reversal of the convictions, I believe that the panel seriously erred in vacating the downward departures ordered by Judge Davies. In my opinion, the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

In stretching to reach its result, the panel casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines. It is only by exhalting the rigid calculations of charts and tables over the judgment of human beings that the panel reaches its conclusion that Judge Davies was too lenient. The panel's encroachment on district court discretion epitomizes the mechanical and inflexible approach to

sentencing that so many critics contend the Guidelines themselves represent.[1] Indeed, under the panel's view of the district judge's role in sentencing, district courts would be divested of much of the limited discretion they retain under the Guidelines. As a result, the panel's opinion would make far worse an already unfair and unjust sentencing scheme. It is difficult to believe that the panel truly wishes such an approach to apply to defendants generally.

The panel's unduly restrictive approach to Guidelines sentencing is not the sole vice in its opinion. The opinion is both internally inconsistent and in direct conflict with our prior holdings. As a result, it does not even have the virtue of clarifying our departure jurisprudence. By refusing to use the en banc process, we miss an important opportunity to provide district judges, including Judge Davies on remand, with clear guidance in the area of downward departures and leave them with little choice but to pick and choose among our various irreconcilable statements.

I.

The district judge sentenced Koon and Powell to 30-month prison terms. He determined the sentences to be appropriate after departing downward from the Guidelines range by a total of eight points. First, he concluded that a three-point departure was in order because of the presence of an unusual combination of factors. Second, he concluded that a five-point departure was justified as a result of victim misconduct. The sentence was entirely consistent with the Guidelines.

---

[1] *See e.g.* Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment,* Nat'l L.J., July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines,* 66 S. Cal. L. Rev. 357 (1992) (U.S. District Judge, Eastern District of New York).

The Guidelines are clear that a sentencing judge may depart downward from the Guidelines in "atypical" or "unusual" cases. U.S.S.G. Ch. 1, Pt.A, § 4(b) and § 5K2.O. Moreover, we have noted that, except for a small set of *prohibited* factors, "'the Commission does not intend to limit the kinds of factors, whether or not mentioned elsewhere in the guidelines, that could constitute grounds for departure in an unusual case.'" *United States v. Cook,* 938 F.2d 149, 153 (9th Cir. 1991) (quoting U.S.S.G. Ch. 1, Pt. A, § 4(b)). This approach affords the district court a certain degree of flexibility and permits it to act in a more humane and reasonable manner than the Guidelines would otherwise allow.

In its consideration of the three point combination departure, the panel rejects the relatively enlightened view of departures expressed in both the Guidelines and our prior cases. Judge Davies based his three-point departure on a combination of three non-prohibited factors. He considered the fact that the officers would be subject to additional punishment, both professionally and in prison. *Koon,* 833 F. Supp. at 785-86. He then noted that because "neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal conduct," there was an absence of any need to protect the public. *Id.* at 786. Finally, he concluded that "a specter of unfairness" marked the federal trial because it followed an earlier unsuccessful state prosecution of the officers. *Id.* at 790. Judge Davies emphasized that he did not base his departure on any one of the discrete factors individually. Instead, he departed only because of the combined presence of three circumstances which "taken together, justify a reduced sentence." *United States v. Koon,* 833 F. Supp. 769, 786.

In considering the three-point departure, the panel, despite including cursory language in its opinion acknowledging the correct rule, applies a method of review that if adopted generally would essentially eliminate departures based on a combination of factors. What the panel did was to examine each factor individually and conclude that each was not "appropriate" to support a departure. The panel failed to make the proper inquiry: whether the factor was *prohibited* by the Guidelines.

Instead, it created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure. The fallacy in the panel's approach is that if the individual factors must each be "appropriate," there would be no need to rely on a combination of factors.

The panel's methodology is at odds with our established precedent. The principle underlying our combination departure cases is rooted in the common sense maxim that the whole is greater than the sum of its parts. For that reason, in reviewing combination cases, we have considered the totality of the circumstances and the interplay between or among the various factors, not whether the individual factors in the mix could in themselves constitute a ground for departure. "[I]t will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decisions." *Cook*, 938 F.2d at 153; *see also United States v. Fairless*, 975 F.2d 664, 669 (9th Cir. 1992); *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992), *and subsequently superseded*, U.S.S.G. § 5H1.12; *United States v. Takai*, 941 F.2d 738, 743 (9th Cir. 1991).

The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead, it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor—notwithstanding the fact that *none* of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review.

A clear example of the panel's erroneous approach is found in its discussion of the vulnerability to prison abuse issue. The panel rejected Judge Davies' consideration of this factor on the ground that "the number of defendants who might qualify for *this departure* is virtually unlimited...." 34 F.3d 1416, 1455 (emphasis added). The term "this departure" is clearly incorrect. There was *no departure* based on the factor that the panel is

discussing. The departure at issue was based on a combination of factors that included as only one element the potential for prison abuse. The number of persons who would be affected by the combination of factors would *not* be "virtually unlimited." To the contrary, the number would be small indeed. Thus, the panel's statement as to the number "who might qualify" is just plain wrong. It reaches its mistaken conclusion only because it violated *Cook's* clear command and considered one factor in the combination "abstractly and alone." *Cook*, 938 F.2d at 153. Far more important, however, it is this method of analysis that permeates the panel's opinion and leads it, inevitably, to the wrong result.

The panel's discussion of the *kinds* of factors that Judge Davies considered in his three-point departure gives rise to even more serious problems. Some of our cases have held that only factors that relate to the offender's culpability or to the nature of the offense may justify departure. *See, e.g., United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Others have reached precisely the opposite conclusion. *See, e.g., United States* v. *Crippen*, 961 F.2d 882, 885 (9th Cir. 1992). The panel fails to reconcile these irreconcilable positions.

Although the panel's opinion purports to endorse the highly restrictive view set forth in *Alvarez-Cardenas*, in the end it only adds to the chaos in our case law. Following *Alvarez-Cardenas*, the opinion flatly states that "personal and professional consequences" of a conviction "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." 34 F.3d at 1427. However, that statement, while consistent with *Alvarez-Cardenas*, conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991) (stating that the effect of imprisonment on the offender's family *is* a permissible basis for departure); *see also* § 5H1.6. Perhaps because it recognized the conflict in our cases, or perhaps because it perceived the gross unfairness of its position, the panel substantially undermines the statement by announcing that it does "not intend to imply that factors that do not speak to" the nature of an offense or culpability "are *never* relevant." 34 F.3d at 1427 n.3. (emphasis in original). Such

conflicting pronouncements within the same opinion cannot help district judges who must administer the Guidelines and make sense of our holdings; nor should they stand as the law of this circuit.

Moreover, the panel's statements that the "personal and professional consequences" of a conviction may not be considered constitutes a square rejection of the holding we announced in *United States v. Aguilar*, 994 F.2d 609, 643-45 (9th Cir. 1993) (opinion of O'Scannlain, J.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). In *Aguilar*, Judge O'Scannlain, in the part of his opinion joined by Judge Hug, explained that district courts have discretion to depart downward from the Guidelines on the basis of the "additional punishment" beyond imprisonment that a conviction may impose. *Id.* at 643.

The panel does not address *Aguilar's* reasoning. While the panel is correct that the original panel opinion in *Aguilar* no longer represents binding precedent, it is surely wrong in concluding that the opinion therefore merits no more than a dismissive half-sentence reference to that fact. 34 F.3d at 1453. The en banc court reheard the case and reversed Aguilar's conviction; accordingly, it did not reach the sentencing question. As a result, the court as a whole never expressed any doubt as to the correctness of Judge O'Scannlain's extensive and perceptive discussion of downward departures. Unlike the panel here, Judge O'Scannlain saw no reason to prohibit sentencing judges from taking into account the practical effects of sentences on the lives of affected individuals. As his opinion made clear, the Guidelines were not intended to treat human beings as impersonal object whose fate was to be determined solely on the basis of statistical surveys.

Judge O'Scannlain's opinion in *Aguilar* was still binding at the time Judge Davies imposed the sentences on Koon and Powell. Accordingly, he acted properly in basing the sentencing

decision on that holding. *Koon*, 833 F. Supp. at 789.[2] At the time of sentencing, our law was clear that "additional punishment" did constitute a proper basis for a downward departure. At a minimum, Judge Davies, as well as other district judges, are entitled to an explanation from the panel as to why we are so abruptly rejecting the *Aguilar* reasoning. So, too, are the defendants who were properly sentenced under the law as it existed at the time of sentencing only to find that on appeal a panel of our court adopted a different view that requires them to be resentenced under a harsher standard.[3] In my opinion, the panel was not justified in peremptorily dismissing a reasoned analysis that bears so directly on the issues in this case and has such drastic consequences for these and other defendants.

II.

The panel's analysis of the five-point departure, like its analysis of the three-point departure, is premised on a highly restrictive and inflexible reading of the Guidelines and a view hostile to the district court's proper role in sentencing. Judge Davies based his five-point downward departure on his finding

---

[2] *Aguilar* was not taken en banc until almost a month after Judge Davies filed his opinion.

[3] The fact that Koon and Powell will now be resentenced under a stricter interpretation of the Guidelines than existed at the time of their initial sentencing itself constitute a circumstance to be considered at resentencing. While the change in our case law may not be enough in itself to justify a downward departure, the sentencing judge may want to consider the psychological and emotional effect on the defendants of the change in our law. Both defendants were initially properly sentenced to shorter terms under a rule of law that was valid at the time. There is a certain expectancy that results from such a circumstance. Each defendant now faces a potentially harsher prison term only because the sentencing rules have been changed as the result of the government's appeal. Ironically, the panel's decision may thus have the effect of creating a new "specter of unfairness" which could be considered, consistent with the Guidelines, as one of the factors in a combination justifying departure.

that there was victim misconduct. *Koon*, 833 F. Supp. at 787. The panel accepted this finding; accordingly, our analysis must start from that premise, correct or not. The Guidelines specifically provide for downward departures when victim misconduct "contribute[s] significantly to provoking the offense behavior." § 5K2.10. The panel reversed Judge Davies' departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response. 34 F.3d at 1457-1458. Here, again, the panel erred.

The applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct. The policy statement specifically instructs a district court to consider "*any other relevant conduct* by the victim that substantially contributed to the danger presented." § 5K2.10(e) (emphasis added). Moreover, it suggests that a departure may be warranted if the unlawful behavior follows an "*extended course* of provocation and harassment." *Id.* (emphasis added).

Having erroneously concluded that provocation encompasses only a very limited range of acts, the opinion surmises that in fact Judge Davies must have based the departure on the volatility of the arrest. The panel then proceeds to explain why volatility *never* constitutes a permissible ground for departure in an excessive force case—although it can point to no guideline language that would support such an absolutist view. 34 F.3d at 1458-1459. In short, the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart.

III.

Our cases adopt two contradictory general approaches to downward departures. One approach emphasizes the importance of the district court's discretion to depart and stresses that the guidelines "were not meant to be a straight jacket for district judges." *Cook*, 938 F.2d at 152; *United States v. Garza-Juarez*, 992 F.2d 896, 911 (9th Cir. 1993). The other takes a narrow

view of the sentencing judge's role and severely limits the circumstances that justify departure. *See, e.g., Alvarez-Cardenas*, 902 F.2d at 737. For reasons that still confound me, in this case the panel casts its lot with the restrictive approach.

In choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner. Certainly, the panel does nothing to resolve the underlying conflict in our case law. Only an en banc panel can do that in any event. As of today, our rules remain unclear and district judges are left with little guidance. They will simply have to do their best to determine which of our cases—and which of the contradictory statements in the panel's opinion—are to be followed in particular circumstances.

As a result of our refusal to take this case en banc, all Judge Davies will know with certainty on remand is that in order to depart from the Guidelines, he must point to "a legitimate sentencing concern," 34 F.3d at 1453, & 1457, and must consider factors that are consistent with the "structure and purposes of the Guidelines," 34 F.3d at 1452. The conflicting definitions we have given to these virtually empty phrases will leave Judge Davies without specific guidance when he decides whether to depart downwardly once again. If after reexamining all of the facts and circumstances in this most regrettable case, he again concludes that there are factors present that warrant a downward departure from the Guidelines, he will only be able to do his duty as he himself sees it. I hope that this time any exercise of the discretion he is supposed to possess will be examined with greater understanding and solicitude.

Of course, the Supreme Court may yet provide Judge Davies with the guidance that our own court has refused to offer. I note in this regard that the panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion authored by then-Chief Judge Breyer, a leading member of the initial Sentencing

Commission. *See United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993).

Rivera holds that the Guidelines do permit departures for personal or professional consequences of conviction that are unusual. *Id.* at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will *"not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original). In all three respects, Judge Breyer's approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case.

Given the frequency with which district judges are faced with the type of question that now confronts Judge Davies, and given the conflict within the circuits created by the panel's opinion, perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines.

IV.

As a final point, I note that once again, consistent with our long-standing policy, we refuse to disclose to the public important information regarding an official action of this court. Following an en banc vote, we only tell the public whether or not the en banc call carried. We refuse to disclose whether a decision not to go en banc was made by an equally divided court or whether only a single judge wished to reconsider the panel's

decision. We also refuse to disclose how individual judges cast their ballots.[4] By these rules, we immunize our individual actions from public scrutiny. In my opinion, we are wrong to do so. The public has a right to know how all public officials, including judges, conduct the public's business.

I am aware of the arguments in favor of the rule that we have adopted. It is possible that a vote for or against en banc review will be misconstrued by the public as constituting agreement with or opposition to the merits of the opinion in question even though a judge has cast his ballot on entirely different grounds. However, the fact that a public action may be misunderstood is not a reason for suppressing information. Whatever the costs of disclosure may be, I have no doubt the costs of secrecy are greater.

I have addressed the problems of non-disclosure of en banc votes before. Previously, I noted that the public is often deprived of crucial information regarding death penalty cases. *See Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990). I have also noted that our rule of secrecy is equally indefensible in other cases that involve questions of great public interest. *See Elder v. Holloway*, 984 F.2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting)

---

[4] Under our rules, all active judges are permitted to vote on en banc calls and a call fails unless a majority of the non-recused judges cast affirmative votes. Our rules do not permit judges who wish to record their votes to do so. Instead, judges may inform the public of their votes only through their participation in dissents from denials of suggestions for rehearing en banc. Many judges prefer not to join in published opinions expressing disagreement with procedural actions of this court, even when those actions determine the outcome of important cases. As I have noted before, our rule ensures that the public knows even less about our en banc process than it does about the Supreme Court's decisions with respect to granting certiorari. *See Harris v. Vasquez*, 949 F.2d at 1539 (explaining that Supreme Court Justices are always permitted to make public their votes on petitions for certiorari).

(disagreeing with the rule precluding disclosure of en banc votes in the context of a civil right case).

Indeed, it is usually the most controversial cases—and the ones that are likely to have the widest impact on the public—that are the subject of the most fiercely debated en banc calls. The votes cast in them are clearly of concern to the public. The people have a right to know both how close the decision is on our en banc votes and how each judge voted on particular calls.

Information about the numerical outcome of the votes is necessary in order for the public, the legal community, and the academic world to assess the en banc process itself. For example, it would surely be of interest to those who study the courts if a series of en banc calls failed even though supported by a majority of the judges who actually voted. With such information, court observers could evaluate the soundness of our voting procedures and suggest reforms. There is another reason that readily comes to mind. There are several vacancies on this court. In fact, one seat has been vacant for well over two years. Disclosure of the numerical outcome of our en banc votes would assist the public in determining the practical impact on our operations of the president's inexplicable failure to perform his constitutional duties expeditiously and to better assess the quality of his performance in office. Could one or two votes have made the difference here? The public is entitled to the information that would answer that question.

The public also has a right to know how individual judges voted. Circuit judges have on occasion been appointed to the Supreme Court—even Ninth Circuit judges. The votes on en banc calls constitute a part of a circuit judge's performance of his judicial duties. The votes may provide an indication of how certain judges would perform on the highest court, particularly with respect to the granting of writs of certiorari. In any event, the public has a right to know how each judge who has life tenure has performed all aspects of his judicial functions. Public scrutiny and accountability are the only checks there are on us, other than impeachment.

Finally, the disclosure of the votes of individual judges might reveal whether there are discernible patterns to the outcome of our en banc calls. It could shed light on whether our votes are consistently based on ideological lines and whether there is a pattern in our voting that is related to the party affiliation of the presidents who appointed us. That information would clearly be of interest to students of the judicial system, and, given that so many of our en banc calls involve controversial cases, probably the public and members of the political branches of government as well.

To me, the reasons for disclosure are obvious and irrefutable. I particularly regret that in this case, which is of such public concern, the rules prevent the disclosure of information to which the public is so clearly entitled.

O'SCANNLAIN, Circuit Judge, specially concurring in the dissent, with whom T.G. NELSON and KLEINFELD, Circuit Judges, join:

With the exception of Part IV, I am delighted to concur in Judge Reinhardt's dissent. While desirability of disclosure of en banc voting results is a worthy topic for discussion, I am not convinced this is the appropriate forum.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO.
	)	CR 92 686 JGD
	)	
	)	SENTENCING MEMORANDU
Plaintiff,	)	
	)	
v.	)	
	)	
STACEY C. KOON,	)	
LAURENCE M. POWELL,	)	
TIMOTHY E. WIND, and	)	
THEODORE J. BRISENO,	)	
	)	
Defendants.	)	
	)	
	)	

INTRODUCTION

Four Los Angeles Police Officers, Stacey C. Koon, Lawrence M. Powell, Timothy E. Wind, and Theodore J. Briseno were indicted by the United States in a Two-Count Indictment filed August 4, 1992. The Indictment charges in Count One that defendants Laurence F. Powell, Timothy E. Wind, and Theodore J. Briseno violated Title 18, United States Code, Section 2, and Title 18, United States Code, Section 242, and aided and abetted each other. The Government charges that while acting under color of the laws of the state of California, said officers willfully struck with batons, kicked, and stomped Rodney Glen King, resulting in bodily injury to him and, thereby, willfully deprived him of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be secure in his person and free from the intentional use of unreasonable force by one making an arrest under color of

law. The aiding and abetting count was stated in Count One of the Indictment, but at trial was treated as a separate count and was submitted to the jury as such.

Count Two of the Indictment alleges violation of Title 18, United States Code, Section 242, and is directed against Stacey C. Koon alone. He is charged with willfully permitting the other officers in his presence, and under his supervision, to unlawfully strike with batons, kick, and stomp Rodney Glen King and with the willful failure to prevent the unlawful assault by said officers, all in violation of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody.

The case was tried to a jury commencing February 25, 1993. The jury reached its verdicts on April 16, 1993, and the verdicts were handed up on April 17, 1993.

By said verdicts the jury found that none of the defendants was guilty of aiding and abetting, that Officer Briseno was not guilty of the charges alleged in Count One and was acquitted, that Officer Wind was not guilty of the charges alleged in Count One and was acquitted, that Officer Powell was guilty of the charges other than aiding and abetting alleged in Count One, and that Sergeant Koon was guilty of the charges alleged in Count Two.

The matter is now before this Court for the sentencing of Lawrence M. Powell and Stacey C. Koon. The Court has reviewed, read, and considered the presentence reports, the addenda thereto, the position papers and sentencing memoranda filed by the defendants and by the Government. The Court has reviewed and considered a multitude of letters relating to the trial of the case and sentencing, and letters written in support of

the defendants. The Court has also considered the United States Sentencing Commission *Guidelines Manual*, effective November 1, 1992,[1] and the arguments of counsel. Based thereon, the Court makes its findings as follows and sentences the defendants as follows.

FINDINGS OF FACT

The details of the arrest of Rodney Glen King in the early morning hours of March 3, 1991, on Osborne Street near Hanson Dam, Los Angeles, were disclosed at trial. Multiple motions were made before trial in an effort to resolve the many legal problems that emerged, and witnesses testified and evidence was taken between February 25, 1993, and April 6, 1993. The Government presented its case in great detail. It is hard to imagine that the Government overlooked any fact. However, because the verdicts were general and no special findings were made by the jury, certain factual conclusions and findings remain undetermined. For the purposes of sentencing it falls to the Court to make those findings.[2]

The essential facts proved at trial were as follows:

During the early evening hours of March 2, 1991, Rodney Glen King met with two friends and sat in his wife's Hyundai

---

[1] Hereinafter "the Guidelines."

[2] The government argues in its Consolidated Positions and Objections With Respect to Sentencing Factors that there are factual errors in the pre-sentence reports and the Court should make findings pursuant to Federal Rule of Criminal Procedure 32(c)(3)(D), or declare that the facts in dispute are not relied upon by the Court for sentencing. To the extent the disputed facts are consistent with the Court's recitation of the facts herein, the Court finds those to be the facts for sentencing purposes. To the extent there is inconsistency, the Court declares it has not relied upon the inconsistent facts set forth in the pre-sentence reports.

automobile in Altadena, a suburb of Los Angeles, drinking a malt beer beverage, Old English 800, packaged in 40-ounce bottles. Mr. King consumed at least two bottles. His friends also drank Old English 800. Although it is not clear precisely how much they each consumed, it is certain that Mr. King consumed more than 80 ounces. Mr. King and his friends drank in the parked automobile for a number of hours. Late in the evening, they left Altadena in the Hyundai. Mr. King drove. Their intended destination is not clear. Mr. King testified that it was Hanson Dam, but his friend Bryant Allen testified that the three companions left Altadena to "look for women."

Mr. King was intoxicated. He drove the Hyundai from Altadena to the 210 Freeway, then west from Pasadena towards the city of San Fernando. While westbound, in the vicinity of La Tuna Canyon Road, CHP Officer Melanie Singer and Officer Tim Singer, her husband and training officer, observed the Hyundai speeding westbound on the freeway behind the CHP cruiser. Officer Melanie Singer was driving. The CHP vehicle exited and re-entered the freeway at Sunland Boulevard, and with red lights and siren activated followed the Hyundai, which was by then about one mile west of the CHP vehicle. Officer Melanie Singer estimated the speed of the Hyundai west of Wheatland Avenue as being in excess of 100 m.p.h.

Mr. King left the freeway at Paxton Avenue and commenced traveling on surface streets, followed by the Singers' CHP unit. Officer Melanie Singer called for back up. The CHP dispatcher alerted LAPD by radio call. The call was heard by patrol officers of the Los Angeles Unified School District in a unit nearby which joined the chase. In addition, Officers Powell and Wind in an LAPD unit responded to the call. During the pursuit, the CHP officers attempted to communicate with Mr. King as he drove on the surface streets, and ordered him to pull over. He failed to do so. Mr. King testified that he did not pull over because he was afraid of returning to prison.

Mr. King continued on the route chosen by him, at times stopping for red lights, at times proceeding through red lights. The CHP vehicle and the school district vehicle followed the

Hyundai at varying speeds. They were joined by Officer Powell and Wind's vehicle. After the Hyundai left the freeway, the pursuit was always at moderate to slow speeds. The three police vehicles followed the Hyundai for a number of miles on surface streets to the point where it stopped at an entrance to the Hanson Dam recreation area on Osborne Street. In all, the CHP unit followed the Hyundai for approximately eight miles before the pursuit ended.

The CHP vehicle, the School District vehicle, and Officer Powell's vehicle came to rest in the immediate vicinity of the Hyundai. The occupants of the Hyundai were ordered out of the vehicle by Officer Singer. The two passengers exited the Hyundai and followed instructions of the police officers. Mr. King was slow to move from the driver's seat but ultimately did and was repeatedly ordered to lie on the ground. He emerged from the Hyundai smiling. This was the scene when Sergeant Koon arrived. Officers Briseno and Rolando Solano arrived in their unit moments after Sergeant Koon.

Mr. King did what appeared to be a dance step, and then waved at an LAPD helicopter overhead. Officer Melanie Singer ordered Mr. King to move away from the Hyundai and to place his hands where she could see them, and then again ordered him to the ground. When she did so, he grabbed his buttocks. Officer Singer pointed her service revolver at him. Mr. King did not lie prone but moved around on his hands and knees.

Sergeant Koon took command and ordered Officer Melanie Singer to holster her service revolver. The LAPD officers then commenced the arrest process. Mr. King was a large muscular man and a felony suspect. Sergeant Koon testified that he thought Mr. King may have been recently imprisoned because Mr. King appeared to have engaged in the bodybuilding common among prison inmates. The officers ordered Mr. King to lie in the felony-prone position. He refused to do so. Officers Powell, Wind, Briseno, and Solano jointly attempted to place Mr. King in a felony-prone position. He resisted and became combative, forcing the officers to retreat. The subsequent events

were captured by Mr. George Holliday on videotape, Exhibit 20 at trial.

The tape does not capture the entire sequence. It records the events commencing with a view of Mr. King on the ground, surrounded by officers. The Holliday videotape became the focus of a good deal of testimony at trial and was analyzed in thorough detail by expert and other witnesses called by each side. The Court has reviewed the tape for the purpose of sentencing. Although the videotape creates a vivid impression of a violent encounter, careful analysis shows that it is sometimes an ambiguous record of the crucial events. A meaningful understanding of the events it depicts required the explanation of witnesses who are experts in law enforcement. At trial the Government and defendants agreed that much of the officers' conduct was justified and legal, yet vigorously disputed whether and when their behavior became illegal.

The principal question for sentencing not answered by the verdicts is, when did the offenses committed by Officer Powell and by Sergeant Koon occur? The answer to this question determines the extent to which these defendants are liable for Mr. King's injuries. Injury is an element of the offenses with which Officer Powell and Sergeant Koon were charged, and is relevant to the determination of their sentences under the Sentencing Guidelines.

Answering this question requires a two-tiered inquiry. The offenses the jury found to have been committed occurred when Officer Powell used excessive force and formed the intent to deprive Mr. King of his civil rights, and when Sergeant Koon intended to refrain from preventing the officers under his control from using excessive force which deprived Mr. King of his constitutional rights. Sergeant Koon's criminal liability is not derivative from Officer Powell's liability. *See United States v. Reese*, 2 F.3d 870, 889-90 (9th Cir. July 28, 1993). Sergeant Koon's conviction rests entirely upon the wrongfulness of his own conduct, that is, his willful refusal to prevent illegal use of force in his presence. *Id.* Thus, the Court must make separate

determinations concerning Officer Powell's and Sergeant Koon's illegal behavior.

(1) Officer Powell

The videotape displays a continuum of events involving behavior that was initially legal and which became criminal. The initial task for the Court, for the purposes of sentencing, is to determine when Officer Powell's behavior became illegal. Did it become illegal only once and then continue to be illegal for a period of time, or was it at times legal and at times illegal? The Court finds that Officer Powell crossed the line between legal behavior and illegal behavior once. This is demonstrated in Exhibit 20.[3]

Although the videotape is reliable evidence of the physical events that unfolded in the course of Mr. King's arrest, it provides less direct evidence concerning two factors central to Officer Powell's illegal behavior. To determine that at any given point Officer Powell's behavior crossed the line into illegality, the Court must find that Officer Powell used objectively unreasonable force, and that he intended to use excessive force. The standard for objectively unreasonable force is supplied by the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L.Ed.2d 443 (1989), which held that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The *Graham* Court cautioned that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*

---

[3] Exhibit 20 is time calibrated. References are to the calibrations which appear in terms of minutes, seconds, and frames.

Accordingly, in evaluating the videotape, the Court must take into account the totality of the circumstances, including facts not displayed on the tape. Mr. King had not bean searched. Mr. King did not respond to the electrical charge of Sergeant Koon's taser. Sergeant Koon testified that he observed Mr. King sweating profusely. At least during the initial stages of the arrest process, Sergeant Koon may reasonably have suspected that Mr. King was under the influence of PCP because of Mr. King's erratic and recalcitrant behavior.

The initial image on the Holliday videotape is of Mr. King on the ground surrounded by officers. For a brief period, he appears to have been motionless. Mr. King testified that during that moment he decided to try to escape through a gap between the Hyundai and a police vehicle into the Hanson Dam recreation area. He then rapidly rose to his hands and knees, and to his feet. He turned, outstretched his arms forward, and charged towards Officer Powell. Officer Powell took a step and struck Mr. King on the right side of his face and head with the side-handle baton. Mr. King fell to the ground. As Mr. King continued to attempt to rise, he was struck by Officer Powell and then by Officer Wind.

Officer Powell struck Mr. King repeatedly on the lower extremities from the 35th second of the tape to the 51st second of the tape. Officer Powell also delivered a blow to Mr. King's upper torso. Mr. King moved throughout this period, posing an apparent threat. He was ordered to assume the felony-prone position, but failed to respond to these commands. At 55 seconds into the tape, Officer Powell struck Mr. King on the chest or upper abdomen. He rolled over from a position with his abdomen on the ground to a position on his back. Mr. King's right hand moved in a downward direction across his chest and abdomen. Officer Powell struck Mr. King's chest or upper abdomen while Mr. King's hand was moving. After this blow, which may be seen at frame 55:08 on Exhibit 20, the application of force was suspended. The officers observed Mr. King roll over once more onto his abdomen. They watched him for 10 seconds.

In frames 1:03 and 1:04, Officer Powell reached for and briefly handled his cuffs, which were dangling from his right, back trousers pocket. This movement is evidence that Officer Powell perceived Mr. King to be no longer a threat and ready for cuffing.

At 1:05:20, Officer Briseno used his left foot to kick or stomp Mr. King in the upper thoracic area. Mr. King's body writhed in response. His feet rose, his head rose, and he raised his upper torso on his elbows. These movements by Mr. King were reflexive and nonvoluntary. He posed no threat.

Officer Powell struck Mr. King with his baton at 1:07:28 and thereafter struck him another 5 or 6 times.[4] Officer Wind struck Mr. King 4 times with his baton, and kicked him in the upper thoracic or cervical area six times. Mr. King suffered this series of blows until approximately 1:26. At 1:30:13, Officer Powell handed his cuffs to Officer Briseno, and officers surrounded Mr. King. Mr. King was cuffed at 1:42. The procedure continued to 2:05, by which time Mr. King was tied.

As explained below, the Court finds that Officer Powell's offense conduct commenced when he struck King at 1:07:28 on Exhibit 20, and continued to 1:26:00. He crossed the line between legal and illegal behavior at this time. No force used by Officer Powell prior to the blow memorialized on the videotape at 1:07:28 rose to the level of criminal deprivation of Mr. King's rights. Some of it was beyond the standards and practice of the LAPD. However, none of this conduct constitutes a violation of 18 U.S.C. § 242.

To determine the extent to which Mr. King's injuries resulted from Officer Powell's illegal behavior, it is necessary to determine when they occurred and whether they were the

---

[4] Because of the quality of the tape, a precise count is not possible.

product of illegal force. These injuries fall into three broad categories: (1) fractures of facial bones and lacerations to the right forehead and facial area, (2) fracture of the distal fibula in the right leg, and (3) body bruises, contusions, and abrasions. The Court's inquiry is whether any of these injuries occurred prior to 1:07:28.

The Facial Fractures and Forehead Laceration. The most contested issue at trial relating to injuries was whether Mr. King's facial fractures and forehead laceration were the result of a baton blow, or blows, by Officer Powell, or the result of his face coming into contact with the ground surface. The Court finds that these facial injuries were caused by Officer Powell and that they occurred in the earliest sequence on the videotape when Mr. King, attempting to escape, charged toward Officer Powell.

Although the videotape is out of focus and the camera is moving too rapidly to record the events with unequivocal clarity, the videotape and other evidence demonstrates that Mr. King rose rapidly to his feet, turned, extended his arms and ran towards Officer Powell, who stepped into Mr. King's path and struck Mr. King with the side-handle baton on the right side of the face and skull. The baton is demonstrated in the tape at this point as being in Officer Powell's hands, vertical, and parallel to Mr. King's upright body.

At trial the government presented evidence that this blow to the head was outside LAPD use-of-force policy guidelines if Officer Powell intended to strike Mr. King's head. However, the Court cannot find that this blow was objectively unreasonable in the totality of circumstances or that Officer Powell acted with an illegal intent. In view of Mr. King's sudden approach and Officer Powell's legitimate interest in stopping the hard-charging Mr. King, Officer Powell may have directed a blow at Mr. King that inadvertently struck his head. Telling evidence that the head blow was unintentional is provided by the fact that Officer Powell never clearly applied force to Mr. King's head again, although he had ample opportunity to do so. Accordingly, Officer Powell is not criminally liable for Mr. King's head and facial injuries.

The Leg Fracture. Mr. King sustained a fracture of the fibula in the right leg. This fracture was in the lower portion of the leg, and the Government argues that it was the result of a blow administered by Officer Powell at approximately 43 seconds into the videotape. The Court agreed it is clear that at that point Officer Powell struck Mr. King with the baton in the area of the right ankle, and that this blow caused Mr. King's fracture.

However, blows to leg joints are within the policy guidelines of the Los Angeles Police Department if necessary to forestall a threat. Preceding the relevant moments the situation had evolved rapidly. Mr. King had tried to rise, and as Officer Powell delivered the blows to the legs, Mr. King continued to move and resist repeated attempts to place him into the felony-prone position. It is unclear that a reasonable officer at the scene would not have delivered at least some of these blows. Moreover, in view of the rapidly shifting nature of the situation, the Court cannot find that Officer Powell intended to use excessive force. Accordingly, although Officer Powell's blow may have been tortious, he is not crimInally liable for the fracture of the fibula.

Body Bruises and Contusions. As described *supra*, at 55 seconds into the tape, Officer Powell struck Mr. King on the chest or upper abdomen as Mr. King's body moved and Mr. King's right hand reached downward across his chest in the direction of the waistline of his pants. At trial Sergeant Mark Conta testified that this was a flagrant violation of the LAPD's use-of-force policy guidelines. However, Mr. King had not been searched, and a reasonable officer at the scene may have judged that Mr. King was reaching for a weapon. Moreover, it is unlikely that Officer Powell intended to use excessive force. The situation forced him to react swiftly to Mr. King's hand movement, and it was not unreasonable for Officer Powell to block the hand movement with his baton. Under the circumstances this blow was not objectively unreasonable. The chest blow did not produce chargeable injury under 18 U.S.C. § 242.

Officer Powell's conduct clearly crossed the line into illegality at 1:07:28 when he struck Mr. King despite his perception that Mr. King was no longer a threat. Officer Powell is liable for the bodily injury he inflicted. He is not liable for bodily injury inflicted by Officer Wind during this period. The precise injuries caused by Powell were not demonstrated at trial. Mr. King undoubtedly sustained contusions as a result of the six blows by Powell. But the nature and extent thereof are unknown. It is impossible to distinguish between the injury inflicted by Wind and that inflicted by Powell. However, the injuries for which Powell is liable are limited to contusions, perhaps abrasions, but no fractures. For the reasons cited above, the Court finds that Officer Powell's behavior did not violate 18 U.S.C. § 242 prior to this moment. Thus, Officer Powell is not criminally liable for injuries sustained before this moment.

(2) Sergeant Koon

The remaining task is to determine when Sergeant Koon's behavior became criminal. The Ninth Circuit has stated that "a police sergeant who stands by and watches while officers under his command use excessive force and refuses to order them to stop may thereby 'subject' the victim to the loss of his or her right to be kept free from harm while in official custody or detention." *See Reese*, 2 F.3d at 889. The police sergeant must recognize that the force is excessive and that there are reasonable steps within his power that he could take to prevent the use of force. *Id*. at 890. Finally, the police sergeant must deliberately or willfully refrain from preventing the excessive force. *Id*.

The court in *Reese* does not squarely address whether the unlawfully excessive force must stem from criminal conduct by officers under the police sergeant's control. Nonetheless, the court's reasoning in *Reese*, as well as authority from other circuits, implies that a police sergeant is liable for permitting harm from excessive force, even when the supervised officers' conduct does not rise to the level of criminal activity, provided that the conduct is a constitutional tort. *See Id*. at 889-90; *O'Neill v.- Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988).

Accordingly, to determine the extent of Sergeant Koon's criminal liability, it is necessary to assess whether he failed to prevent tortious or criminal excessive force applied by Officers Powell, Wind, and Briseno.

Three facts simplify this inquiry. First, Officer Briseno's use of force against Mr. King was limited to a single stomp or kick at 1:05.20. Because Sergeant Koon could not have anticipated Officer Briseno's sudden movement, he is not criminally liable for failing to prevent this kick or stomp.

Second, prior to 1:07.28, Officer Wind delivered several blows to Mr. King in response to Mr. King's attempt to flee and his repeated efforts to rise from the ground. Because Mr. King posed a continuing threat, the Court cannot find that a reasonable officer would not have delivered these blows, or that Sergeant Koon had the requisite criminal intent in permitting them.

Third, the Court has found that prior to 1:07.28, Officer Powell's conduct did not violate 18 U.S.C. § 242.

For these reasons, the Court's inquiry concerning Sergeant Koon is limited to Officer Powell's potentially tortious use of force prior to 1:07.28, and Officers Powell and Wind's use of force after 1:07.28.

The Facial Injuries. Because the Court has found that these injuries were caused by Officer Powell's lawful application of force, Sergeant Koon is not criminally liable for permitting the blow or blows that caused these injuries.

The Leg Fracture. For the reasons discussed *supra*, the Court has found that Officer Powell lacked the requisite criminal intent to use excessive force when he delivered the blow that caused Mr. King's leg fracture. The same reasons compel the Court to find that Sergeant Koon lacked the requisite criminal intent to permit the use of excessive force. Preceding Officer Powell's blows Mr. King had tried to rise, and he continued to resist being placed in the felony-prone position as Officer Powell delivered the blows. Once before, Sergeant Koon had witnessed

Mr. King successfully resist officers, rise up while prone, and charge, intending to escape, in the direction of Officer Powell. Accordingly, Sergeant Koon is not criminally liable for permitting the blow that caused Mr. King's leg fracture.

Body Bruises and Contusions. Because Officer Powell's blow to Mr. King's chest or upper abdomen was a sudden response to Mr. King's hand movement, Sergeant Koon had no reasonable opportunity to anticipate or prevent it, and cannot be charged with injuries stemming from it.

By contrast, Sergeant Koon is liable for permitting Officers Powell and Wind's conduct after 1:07.28. At this point, Officer Powell's conduct crossed the line into criminal illegality. Moreover, because Mr. King posed no threat, Officer Wind's baton blows and leg kicks were objectively unreasonable. Sergeant Koon could have seen that Mr. King's movements in response to Officer Briseno's kick or stomp were involuntary, and he had a reasonable opportunity to halt Officers Powell and Wind's use of force. Sergeant Koon is liable for his failure to order the cuffing of Mr. King during the 10 seconds immediately prior to the kick by Officer Briseno, and for permitting the application of force by Officers Powell and Wind thereafter. Accordingly, bruises and contusions incurred during this period are chargeable to Sergeant Koon.

(3) Summary

Neither Officer Powell nor Sergeant Koon is liable for Mr. King's serious bodily injuries, namely, his facial injuries and leg fracture. Both officers are liable to differing degrees for Mr. King's bruises and abrasions sustained after 1:07:28. Because neither officer violated 18 U.S.C. § 242 prior to this moment, neither is liable for injuries sustained by Mr. King before the event recorded at 1:07.28 of the videotape, and the Court so finds.

DISCUSSION

A. Calculation of Offense Level Under the Sentencing Guidelines

Both defendants Stacey C. Koon and Laurence M. Powell were convicted of violations of 18 U.S.C. § 242. Section 2H1.4 of the Guidelines addresses the calculation of a base offense level for this offense. *See* Guidelines § lBl.2 (applicable Chapter Two guideline determined by the offense of conviction); Guidelines Appendix A.

Pursuant to Guidelines Section 2H1.4, the appropriate base offense level for a violation of 18 U.S.C. § 242 is the greater of (l) 10; or (2) 6 plus the offense level applicable to the underlying offense.[5]

Where the Guidelines specify more than one base base level offense, the Court's determination of which to apply is to be based on the defendant's "relevant conduct," as defined in Section 1B1.3 of the Guidelines. "Relevant conduct" includes:

> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . .

See Guidelines § lBl.3(l)(A).

---

[5] Application Note 1 to Guideline Section 2Hl.4 provides that "6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. Application Note 1 to Section 2Hl.4 refers the Court to the Commentary of another Guidelines section, Section 2H1.1. According to Application Note 1 to Section 2Hl.l, the "underlying offense" includes "any offense under federal state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1, 2, or 4." *See* Guidelines § 2H1.1, Commentary, Application Note l.

For purposes of calculating Mr. Powell's base offense level, the Court considers his relevant conduct to be the blows he administered after 1:07:28. Mr. Koon, on the other hand, was convicted of an offense of omission, and is liable for failing to stop Powell's and Wind's excessive use of force when he could have and should have. The excessive force used by Powell and Wind with Koon's permission constitutes "relevant conduct" for purposes of calculating Koon's base offense level.[6]

To calculate the defendants' base offense level under Section 2Hl.4, the Court must first determine the appropriate underlying offense and its corresponding offense level. The sum of the corresponding offense level and 6 represents the proper base level offense, if it exceeds l0. *See* Guidelines § 2H1.4, Commentary, Application Note 1.

Based on the defendants' "relevant conduct," the appropriate underlying offense for each is assault. The corresponding offense level, however, depends on whether Powell committed and Koon permitted an aggravated or a minor assault.

1. Aggravated vs. Minor Assault

The government takes the position that the underlying criminal conduct constitutes an aggravated assault, such that the offense levels set forth in Section 2A2.2 apply to both Koon and Powell. The Court agrees.

An aggravated assault, within the meaning of the Guidelines, is a "felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (*i.e.*, not merely to

---

[6] The Court recognizes the critical distinction between Koon's offense conduct and the unlawful conduct committed by Powell. *See Reese*, 93 Daily Journal D.A.R. at 9626.

frighten), or (b) serious bodily injury, or (c) an intent to commit the felony."[7] *See* Guidelines § 2A2.2, Commentary, Application Note 1.

In this case, the assault committed by Powell and permitted by Koon is a felony. Pursuant to 18 U.S.C. § 3559, an offense is a Class C felony if the maximum term of imprisonment authorized is at least ten years, but less than twenty years. Ten years is the maximum term of imprisonment authorized for a violation of 18 U.S.C. § 242 when bodily injury results.[8]

Additionally, the felonious assault in this case involved a dangerous weapon. The term "dangerous weapon," as used in the Guidelines, means an "instrument capable of inflicting death or serious bodily injury." *See* Guidelines § 1B1.1, Commentary, Application Note 1(d). Where an object that appears to be a dangerous weapon is "brandished, displayed, or possessed, the object is to be treated as a dangerous weapon for purposes of

---

[7] The Application Notes to Section 2H1.1 offer the following example of a case in which the underlying offense is aggravated assault:

> in the case of a conspiracy to interfere with a person's civil rights (a violation of 18 U.S.C. § 241) that involved an aggravated assault (the use of force) to deny certain rights or benefits in furtherance of discrimination (a violation of 18 U.S.C. § 245), the underlying offense in respect to both the violation of 18 U.S.C. § 241 (to which § 2H1.1 applies) and the violation of 18 U.S.C. § 245 (to which § 2H1.3 applies) would be the aggravated assault.

See Guidelines § 2H1.1, Commentary, Application Note 1; *see also* Guidelines § 2H1.4, Commentary, Application Note 1 (referring to discussion of "underlying offense" in § 2H1.1).

[8] In this particular case, the Court instruced the jury that a finding of bodily injury was necessary for conviction. *See* Reporter's Transcript of Proceedings (hereinafter "R.T."), 4/10/93, at 13.

sentencing. *Id.* The side-handle baton which Powell used and Koon permitted to be used against Mr. King is certainly capable of inflicting death or serious bodily injury. On this point, there is consensus among the government, the Probation Officer, the applicable case law, and Mr. Powell's own expert witness. *See* Government's Sentencing Memorandum; Presentence Report, para. 70; *United States v. Park*, 988 F.2d 107, 109-10 (11th Cir. 1993) (metal pipe raised in a threatening manner considered "dangerous weapon" for purposes of aggravated assault Guideline), *petition for cert. filed*, July 13, 1993; R.T., 3/31/93, at 20-23 (testimony of defense biomechanics expert, Dr. Carly Ward, that the side-handle baton can deliver sufficient force to cause loss of consciousness and significant localized damage of facial bones).

Further, the evidence presented at trial and the verdicts clearly demonstrate that defendant Powell used the side-handle baton, and defendant Koon permitted its use, with the intent to harm Mr. King. Guidelines section 2A2.2 distinguishes a situation in which a deadly weapon is used "with intent to do bodily harm," from one in which it is used "merely to frighten." *See* Guidelines § 2A2.2, Commentary, Application Note 1. By itself, Powell's repeated use of the metal side-handle baton to strike Mr. King while King was no longer a threat is evidence that Powell intended to inflict bodily harm on Mr. King. *See Park*, 988 F.2d 107, 109-10 (defendant intended to do bodily harm, and was properly sentenced under aggravated assault guideline, where he swung a metal pipe in the direction of IRS agents, and threatened to "bash their heads" unless they complied with his demands); *See also United States v. Bassil*, 932 F.2d 342, 345 (4th Cir. 1991) (defendant who threw chair toward correctional officers was properly sentenced under aggravated assault guideline). Additionally, as defendant Koon testified at trial, he intended Powell to use the baton as an impact weapon to gain pain compliance, and then to "cripple" King and break [King's] bones." *See* R.T., 3/25/93, at 11 & 54; R.T., 3/24/93, at 19 & 28. Based on this testimony and the evidence of Powell's conduct, the Court is persuaded that Powell used the baton, and Koon permitted its use, with the intent to harm Mr. King, not merely to frighten him.

Because the relevant conduct attributable to both defendants Koon and Powell constitutes a felonious assault involving a dangerous weapon with intent to do bodily harm, the appropriate underlying offense is aggravated assault. Pursuant to Guidelines Section 2A2.2, the base offense level for aggravated assault is 15.

2. Specific Offense Characteristics Under Aggravated Assault Guideline

As set forth in Section 2A2.2, certain specific offense characteristics mandate increases in the aggravated assault base level of 15. *See* Guidelines § 2A2.2(b)(l)-(3). If a dangerous weapon, including a firearm, was "otherwise used," the offense level is increased by 4 levels. *See* Guidelines § 2A2.2(b)(2)(B). If the victim sustained bodily injury, the offense level is increased from 2 to 6 levels, based on the seriousness of the injury. *See* Guidelines § 2A2.2(b)(3). The cumulative adjustments for specific offense characteristics may not exceed 9 levels. *Id.*

In this case, a dangerous weapon, the side-handle baton, was "otherwise used." As discussed above, the side-handle baton constitutes a dangerous weapon within the meaning of the Guidelines. *See* supra; Guidelines § 1B1.1, Commentary, Application Note 1(d).

Although the Guidelines do not specifically define the term "otherwise used," its meaning may be inferred from the context in which it is used. Guidelines Section 2A2.2(b)(2), which catalogues the specific offense characteristics for use of a firearm or other weapon during an aggravated assault, provides:

> (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.

See Guidelines § 2A2.2(b)(2)(A)-(C). Thus, a dangerous weapon is "otherwise used" where it is used in some manner other than by brandishing it, threatening its use, or discharging a firearm. Here, defendant Powell actually used his side-handle baton to strike Mr. King; he did not merely brandish it or threaten to use it. Because Powell's side-handle baton was "otherwise used," and because Koon permitted such use, the aggravated assault base offense is increased by 4 levels for both defendants Koon and Powell.[9] *See* Guidelines § 2A2.2(b)(2)(B).

The aggravated assault base offense is increased further if Mr. King sustained bodily injury as a result of the aggravated assault. The extent of the increase depends on the severity of the injuries sustained. The Guidelines indicate a 2-level increase for "bodily injury," defined to mean "any significant injury; *e.g.*, an injury that is painful or obvious, or is of a type for which medical attention ordinarily would be sought." *See* Guidelines § lBl.1, Commentary, Application Note 1(b). A 4-level increase is indicated for "serious bodily injury," defined as "injury involving extreme physical pain or the impairment of a function

---

[9] Mr. Powell's use of a dangerous weapon was also considered in determining that the Guideline for aggravated assault, rather than minor assault, applies. Nonetheless, the Court must again consider it as a factor for upward adjustment. *See Reese*, 2 F.3d at 894-95 (district court properly applied upward adjustments for use of dangerous weapon and bodily injury, notwithstanding that said factors had already been considered in determining applicability of aggravated assault guideline); *United States* v. *Williams*, 954 F.2d 204, 206-07 (4th Cir. 1992) (reversing district court for refusal to apply upward adjustment under aggravated assault guideline based on "double counting" argument). The Ninth Circuit and other courts have rejected the argument that such calculations constitute improper "double counting." *Reese*, 2 F.3d at 894-95; *see also United States* v. *Newman*, 982 F.2d 665, 672-75 (1st Cir. 1992) (aggravated assault base offense level properly increased for infliction of serious bodily injury, notwithstanding that serious bodily injury was initially considered to determine applicability of aggravated assault guideline), *petition for cert. filed*, April 22, 1993.

of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." *Id.*, Application Note 1(j).

It is certain that Mr. King sustained extensive and "serious" bodily injury at some point during the course of the March 3, 1991 use of force. Substantial evidence was presented at trial that Mr. King suffered numerous facial fractures, contusions and lacerations, and a fracture of the fibula in his right leg, Mr. King's injuries required medical intervention, including numerous sutures to close lacerations of his face and scalp, reconstructive surgery to repair his facial fractures, and a cast to set his fractured leg.

However, in reviewing the continuum of events that were initially legal and later became criminal, the Court has found Mr. Powell's use of force to be lawful until 1:07:28, after Briseno's kick. Mr. Koon's conduct was also lawful until 1:07:28. For purposes of sentencing, the Court considers only those injuries sustained by Mr. King after Koon and Powell crossed the line between legal and illegal conduct at 1:07:28. Because the Court finds that Mr. King's head injuries and facial fractures, as well as the fibula fracture, occurred prior to Briseno's kick at 1:05:20, these serious bodily injuries do not warrant an upward adjustment to the aggravated assault offense level.

In addition to the facial fractures, head injuries, fibula fracture, and some contusions, all of which were lawfully inflicted, Mr. King sustained contusions on his arms, legs, chest, shoulders, and back. It is hard to imagine that the six or more illegal baton blows delivered by Powell between 1 minute 7 and 1 minute 26 on the tape did not cause some of these

contusions.[10] The points at which Powell's illegal blows contacted Mr. King's body, insofar as those points can be determined from the evidence, include the arms, shoulders and back, corresponding to the locations of the contusions. Mr. King's contusions were obvious, as established by the testimonial and photographic evidence at trial. Common experience proves that such extensive bruising is painful and may warrant medical attention. In sum, Mr. King sustained some bodily injury, as that term is used in the Guidelines, as a result of unlawful baton blows inflicted by defendant Powell and permitted by defendant Koon.

Because the Court finds that Mr. King's "serious" bodily injuries were attributable to a lawful use of force, whereas certain bodily injuries of a lesser degree were attributable to Koon's and Powell's unlawful conduct, the Guidelines indicate a 2-level increase in the aggravated assault offense level, rather than the 4-level increase suggested by the government.

The base offense level for aggravated assault is 15 pursuant to Guidelines Section 2A2.2(a). With a 4-level increase for use of a dangerous weapon, the offense level is 19. *See* Guidelines § 2A2.2(b)(2)(B). Because Mr. King sustained bodily injury as a result of Koon's and Powell's illegal conduct, an additional 2-level increase is required. *See* Guidelines § 2A2.2(b)(3)(A). Thus, the offense level applicable to the underlying aggravated assault offense is 21. When the aggravated assault offense level of 21 is added to 6, as required under Section 2H1.4(a)(2), the sum is 27. Since 27 is greater than the base offense level of 10 prescribed at Section 2H1.4(a), the final Chapter Two base offense level is 27. *See* Guidelines §2H1.4(a).

---

[10]The kicks and blows delivered by Officer Wind after 1:07:28 may have caused some contusions as well. Mr. Koon permitted and is responsible for these injuries. However, for purposes of determining Koon's offense level, the bodily injury inflicted by Mr. Powell is sufficient to warrant a 2-level increase.

B. Adjustments to the Offense Level

Chapter Three of the Guidelines provides for certain adjustments to the Chapter Two offense level based on the victim's characteristics and the defendant's role in the offense, obstruction of justice, and acceptance of responsibility. None of the Chapter Three adjustments are applicable here.

Mr. King was neither unusually vulnerable nor a government official. *See* Guidelines §§ 3A1.1 - 3A1.2. Mr. King was not physically restrained during the course of the offense. *See* Guidelines § 3A1.3. Therefore, none of the victim-related adjustments apply.

Nor does Mr. Koon's role in the offense warrant an adjustment of the offense level. Mr. Koon did not have an aggravating or mitigating role as defined in the Guidelines. *See* Guidelines §§ 3B1.1-3B1.2. Guidelines Section 3B1.3 requires an upward adjustment where a defendant abuses a position of public trust; however, this enhancement does not apply to civil rights violations under Section 2H1.4, since the base offense level reflects the abuse of authority inherent in the offense. *See* Guidelines § 2H1.4, Commentary, Background.

Pursuant to Guidelines Section 3C1.1 a 2-level increase applies where a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." The Commentary to Section 3C1.1 is explicit that the enhancement applies where a defendant commits perjury. *See* Guidelines § 3C1.1, Commentary, Application Note 3(b).

Mr. Koon testified at trial and denied having acted with the unlawful intent to refrain from protecting Mr. King from an unreasonable use of force. The government contends that the enhancement for obstruction of justice applies here, reasoning that the jury's verdict against Koon necessarily constitutes a finding that Koon testified falsely. The Court disagrees.

A witness testifying under oath commits perjury if he "gives false testimony concerning a material matter with the willful intent to provide false testimony." *See United States* v. *Dunnigan*, ___ U.S. ___, ___, 113 S. Ct. 1111, 1116, 122 L.Ed.2d 445 (1993). A defendant who chooses to testify at trial and makes false statements in his own defense may be subject to an enhancement for obstruction of justice. *See United States* v. *Barbosa*, 906 F.2d 1366, 1369-70 (9th Cir.), *cert. denied*, 498 U.S. 961 111 S. Ct. 394, 112 L.Ed.2d 403 (1990). However, not every accused who testifies at trial and is convicted will incur an enhanced sentence under Section 3C1.1 for committing perjury. *Dunnigan*, ___ U.S. at __, 113 S. Ct. at 1117. An accused may give inaccurate testimony due to confusion, mistake, or memory loss. *Id.* In determining whether to apply Section 3C1.1 to alleged false testimony or statements by a defendant, the testimony or statements are to be "evaluated in a light most favorable to the defendant." *See* Guidelines Section 3C1.1, Commentary, Application Note 1.

Although Mr. Koon's belief that he acted lawfully is mistaken, as indicated by the jury's verdict, the Court finds that Koon's testimony reflects a personal belief which, at the time of trial, he held in earnest. Mr. Koon did not wilfully intend to provide false testimony. That the jury chose to disbelieve Koon's testimony, or found it insufficient to prove lack of intent, does not establish that Koon committed perjury. *Dunnigan*, ___ U.S. at ___, 113 S. Ct. at 1117. An enhancement for obstruction of justice is inappropriate.[11]

---

[11] As an alternative or supplementary basis for an obstruction of justice enhancement, the government suggests that Mr. Koon provided false information to the Probation Officer, by offering his book, *Presumed Guilty*, as an accurate version of the underlying facts. The Court is not persuaded by this argument, as Mr. Koon's book merely records his perceptions about the incident of March 3, 1991.

Since Mr. Koon and Mr. Powell were each convicted of a single count, the Chapter Three adjustments for multiple-count indictments are inapplicable. *See* Guidelines §§ 3D1.1 - 3Dl.5.

Finally, neither Mr. Koon no[r] Mr. Powell is entitled to a downward adjustment for acceptance of responsibility under Section 3El.1, since both defendants pled not guilty, put the government to its burden of proof at trial, and were convicted by a jury. *See* Guidelines Section 3El.l, Commentary, Application Note 2.

C. Applicable Guideline Range

The offense level calculations for both defendants Koon and Powell are summarized as follows:

Aggravated Assault Base Offense Level (§ 2A2.2):	+15
Dangerous weapon "otherwise used" (§ 2A2.2(b)(2)(B)):	+ 4
Bodily injury (§ 2A2.2(b)(3)(A)):	+ 2
Violation of l8 U.S.C. § 242 (§ 2Hl.4(a)(2)):	+ 6
TOTAL OFFENSE LEVEL:	27

Neither Koon nor Powell has a criminal record, *see* Koon Presentence Report, para. 94; Powell Presentence Report, para. 74. Both defendants fall within Criminal History Category I. *See* Guidelines, Ch. 5, Pt A.

Under the Guidelines Sentencing Table, an offense level of 27 with Criminal History Category I results in a prescribed range of 70 to 87 months.

D. Downward Departure

The Court must impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth at 18 U.S.C. § 3553(a)(2). Ordinarily, it must select a sentence from within the Guideline range. However, the Sentencing Commission expressly recognized the inherent difficulties in prescribing "a single set of guidelines that encompasses the vast range of human conduct relevant to a sentencing decision." *See* Guidelines, Ch. l, Pt. A, § 4(b). Thus, the Guidelines are intended to carve out a "heartland" of typical cases. *Id.* When presented with an atypical case, to which a particular Guideline linguistically applies, but where the underlying conduct significantly differs from the norm, the Court may consider whether a departure is warranted. *Id.*

Departure from the Guidelines and sentencing outside the prescribed range is unusual. The Commission adopted the departure policy based, in part, on the belief that courts would not invoke it very often. *See* Guidelines, Ch.l, Pt. A, § 4(b). Departure is permissible only where the Court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *See* 18 U.S.C. § 3553(b); *see also* Guidelines, Ch. l, Pt. A, § 4(b).

A number of specific factors, including race, sex, national origin, creed, religion, and socio-economic status, may never be considered as "aggravating or mitigating circumstances" warranting a departure. *See* Guidelines, Ch. l, Pt. A, § 4(b). With those specific exceptions, however, the Commission did not intend to limit the kinds of factors which may constitute grounds for departure in an atypical case. *Id.*

The present case is atypical in several respects. First, Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. Consequently, though the offense of which defendants Koon and Powell were convicted falls within the language of the Guidelines, Koon's and Powell's underlying

conduct falls outside the range of more typical offenses for which the Guidelines were designed.

Second, defendants Koon and Powell have already sustained, and will continue to incur, punishment in addition to the sentence imposed by this Court. The extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse. Moreover, Koon and Powell will be subjected to multiple adversarial proceedings and stripped of their positions and tenure by the LAPD.

Third, while the offense of conviction involves a serious assault, there is no evidence, and the government does not argue, that Koon and Powell are dangerous or likely to commit crimes in the future.

Fourth, defendants Koon and Powell were indicted for their respective roles in beating Mr. King only after a state court jury acquitted[12] them of charges based on the same underlying conduct. Under these circumstances, the successive state and federal prosecutions, though legal, raise a specter of unfairness.

Of these four factors, only Mr. King's wrongful conduct independently warrants a sentence reduction. *See* Guideline § 5K2.10. Standing alone, none of the other enumerated factors clearly justifies a departure from the Guidelines. However, the Court's decision whether to depart "require[s] the evaluation of a

---

[12]The state of California prosecuted defendant Powell on three counts. He was acquitted on Count I (assault by force likely to produce great bodily injury and with a deadly weapon, Cal. Pen. Code § 245(a)(I)) and Count III (submission of a false police report, Cal. Pen. Code, § 118.1). The jury was divided 8-4 in favor of acquittal on Count II (unnecessarily assaulting or beating any person, Cal. Pen. Code § 149).

complex of factors." *Cook*, 938 F.2d at 151. As the Ninth Circuit observed in *Cook*:

> No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision.

See 938 F.2d at 153. The Court finds that the second, third and fourth factors, taken together, justify a reduced sentence.

Each of the first and second factors, as well as the third and fourth factors in combination, constitute "mitigating circumstances," not adequately considered by the Commission in formulating the Guidelines. See Guidelines, Ch. 1, Pt. A, § 4(b); *see also United States v. Cook*, 938 F.2d 149, 151 (9th Cir. 1991). Based on these unique circumstances, a sentence outside the prescribed Guideline range is appropriate for both defendants Koon and Powell.

i. **Mr. King's Wrongful Conduct**

In reducing Mr. Koon's and Mr. Powell's sentence below the prescribed Guidelines range, the Court finds, and considers as a mitigating circumstance, that Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. *See* Guidelines § 5K2.10; *see also United States v. Yellow Earrings*, 891 F.2d 650, 653-54 (8th Cir. 1989) (affirming downward departure from guidelines where victim substantially provoked defendant's assault by pushing her, verbally abusing her, and publicly humiliating her).

The evidence at trial supports a finding that Mr. King engaged in illegal conduct prior to and during his arrest. Mr. King was admittedly intoxicated while driving. He exceeded the speed limit at times. Mr. King failed to stop his vehicle, even after he belatedly perceived the flashing police lights and sirens. Perhaps due to his intoxication, Mr. King was slow to comply

with police orders to exit his car. In any event, he failed to remain prone on the ground as the police ordered him to do. Rather, Mr. King resisted Officers Briseno, Solano, Powell, and Wind. He attempted to escape from police custody. In doing so, Mr. King, a still unsearched felony suspect, ran in the direction of Mr. Powell. He intended to escape into the unlit recreation area. At this point, the officers' use of the baton commenced. The initial provocation for the subsequent course of events was Mr. King's wrongful conduct.

Significantly, defendants Koon and Powell, along with the other LAPD, CHP, and School District officers at the scene of Mr. King's arrest, were present only by happenstance. Had Mr. King pulled over, and not caused the CHP officers to pursue him for up to eight miles, Koon, Powell and the other LAPD officers would not have been summoned. Messrs. Koon and Powell did not seek out a victim; rather, their very presence at the scene was a consequence of Mr. King's wrongful conduct.

At 6'3" and approximately 225 lbs., Mr. King was appreciably larger than both Koon and Powell. Mr. King's reputation for violence was unknown to the officers, but he was a felony suspect. Mr. King resisted and evaded arrest, persistently failed to comply with police commands, and had not been searched for weapons. As such, the defendants' early perception of Mr. King as dangerous was reasonable. This initial perception was reinforced when Mr. King rose from a prone position on the ground and attempted to escape, running toward Mr. Powell. Whether or not Mr. King actually presented a danger to either Powell or Koon, their perception of danger was reasonable. At this point on the videotape, the use of force begins, provoked substantially, if not entirely, by Mr. King.

From the time of that first baton blow until 1:07:28, when the defendants' conduct crossed the line to illegality, Mr. King

persisted in his failure to obey the police. Defendants Koon and Powell repeatedly ordered Mr. King to assume the felony-prone position to avoid further confrontation.[13]

While Mr. King's wrongdoing precipitated the initial, lawful use of force, and thereby substantially contributed to the offense conduct, Mr. King's provocative behavior eventually subsided. The Court recognizes that by the time the defendants' conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger. Nevertheless, the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King's initial misconduct.

Because the defendants were convicted of violation of 18 U.S.C. § 242, Guideline Section 2H4.1 for interference with civil rights under color of law, and Guideline Section 2A2.2 for aggravated assault linguistically apply. However, Mr. King's wrongdoing and the substantial role it played in bringing about the defendants' unlawful conduct remove this case from the "heartland" of offenses contemplated by the aggravated assault Guideline. *See* Guidelines, Ch. 1, Pt. A, § 4(b).

Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous

---

[13] Although this portion of the memorandum is devoted to identification of mitigating circumstances, it includes a discussion of the factors set forth in Guidelines Section 5K2.10(a)-(e). These factors are relevant to the extent of the sentence reduction, and the Court has considered them for that purpose.

weapon to assault an inmate, without legitimate cause to initiate a use of force.

The two situations are clearly different. Police officers are always armed with "dangerous weapons" and may legitimately employ those weapons to administer reasonable force. Where an officer's initial use of force is provoked and lawful, the line between a legal arest and an unlawful deprivation of civil rights within the aggravated assault Guideline is relatively thin. The stringent aggravated assault Guideline, along with its upward adjustments for use of a deadly weapon and bodily injury, contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for the differences between such "heartland" offenses and the case at hand.

The criminal conduct of a state officer who launches an unprovoked assault on an individual in custody is dissimilar to the conduct of defendants Koon and Powell who, at least initially, were incited to use force. Consistent with the policy of the Guidelines, the sentence imposed must reflect this disparity. *See* Guidelines Ch. 1, Pt. A, § 3 (Guidelines seek reasonable uniformity in sentencing for similar criminal offenses committed by similar offenders); *see also* 18 U.S.C. § 3553(a)(6) (courts should avoid unwarranted sentence disparities among defendants with similar records who are guilty of similar conduct).

ii. Additional Punishment

A legitimate mitigating circumstance arises where a defendant is subject to punishment in addition to the court-imposed sentence. *See United States v. Aguilar*, 994 F.2d 609, 664 (1993). The courts have recognized two categories of "additional punishment" as valid bases for downward departure: (1) the defendant's extreme vulnerability to prison abuse; and (2) the defendant's exposure to additional adversarial proceedings as a result of his conviction. Both categories are applicable to each defendant Koon and Powell.

(a). Extreme Vulnerability to Abuse in Prison

Where the severity of any imposed sentence is increased due to the defendant's "extreme vulnerability" to prison abuse, a downward departure may be considered. *See United States v. Gonzales*, 945 F.2d 525, 526 (2d Cir. 1991); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

Lara involved a prisoner with an immature and fragile appearance and a bisexual orientation, who had been threatened during his presentence incarceration. Prison officials determined that the only way to protect Lara was to place him in solitary confinement. The district court found this extraordinary circumstance increased the severity of Lara's prison term and warranted a downward departure, and the Court of Appeals affirmed. *See Lara*, 905 F.2d at 605.

In *Gonzalez*, the defendant was likewise "extremely small and feminine looking." 945 F.2d at 526. Unlike the defendant in *Lara*, though, Gonzalez was not homosexual or bisexual, nor had he been victimized or threatened prior to sentencing. There was no indication that Gonzalez would be kept in solitary confinement. Notwithstanding, the district court concluded that a downward departure was appropriate to ensure Gonzalez's safety, and the Second Circuit affirmed. *See Gonzalez*, 945 F.2d at 526-27.

Obviously, the facts of the present case are significantly different. From a purely physical standpoint, defendants Koon and Powell are not unusually vulnerable to prison abuse. However, the widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the defendants' status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration. While the Commission did consider the vulnerability of prisoners to physical assault in formulating the Guidelines, *see Lara*, 905 F.2d at 603, the circumstances of this case are extraordinary and were not adequately contemplated. *See* 18 U.S.C. § 3553(b); Guidelines § 5K2.0 (courts may depart based on a factor considered in the

Guidelines where, dub to unusual circumstances, the factor is present to a degree not contemplated by the Guidelines).

The Court would certainly hesitate to grant a departure based solely on Koon's and Powell's vulnerability to abuse. The few cases that support "extreme vulnerability" as a factor for departure are limited to consideration of a defendant's physical characteristics, and are therefore distinguishable. Moreover, while the Second Circuit has expressly upheld a prisoner's extreme vulnerability as a proper ground for departure, the Ninth Circuit has not ruled on the issue. ***But see Aguilar***, 994 F.2d at 644 (citing with approval the Second Circuit's holding in *Lara*, 905 F.2d at 601-03, for the proposition that additional punishment is a valid mitigating factor). Finally, as the government notes, many police officers are now, and have been, safely incarcerated in the federal prison system. *See* Government's Consolidated Positions and Objections, at p. 14 & Ex. G.

However, the Court considers the defendants' vulnerability to prison abuse, not by itself, but in combination with other factors, including another source of additional punishment recognized by the Ninth Circuit: multiple adversarial proceedings. *Cook*, 938 F.2d at 151. As such, the unusual likelihood that Koon and Powell will be fearful of or actually subjected to physical harm while incarcerated, and the resultant increased severity of any sentence imposed, are legitimate factors in the Court's decision to depart downward.

(b). Additional Adversarial Proceedings

In *Aguilar*, the Ninth Circuit recognized that defendants may incur "additional punishment" warranting a downward departure where, as a result of their conviction, they are subjected to further public, quasi-judicial proceedings and the

burdensome consequences that flow therefrom.[14] *See Aguilar*, 994 F.2d at 644 (affirming district court's downward departure on ground that convicted federal judge would be subject to a long course of adversarial proceedings and resultant humiliation and economic burden).

Defendants Koon and Powell will be subjected to a multiplicity of adversarial proceedings. The LAPD Board of Rights will charge Koon and Powell with a felony conviction[15] and, in a quasi-judicial proceeding, will strip them of their positions and tenure.[16] Koon and Powell will be disqualified from other law enforcement careers. In combination, the

---

[14] The Ninth Circuit considered the additional disbarment and impeachment proceedings that Judge Aquilar would endure not as an independent basis for departure, but in combination with the unique burdens that those proceedings imposed. *Aguilar*, 994 F.2d at 644 (citing Cook, 938 F.2d 149, 153 (9th Cir. 1992)). This Court likewise considers a combination of factors in determining that Koon and Powell face "additional punishment." Those factors include the other adversarial proceedings to which Koon and Powell will be subjected and the associated burdens, together with the defendants' vulnerability to prison abuse.

[15] At the sentencing hearing, defense counsel represented that both Koon and Powell also face Board of Rights proceedings on charges of their misconduct on March 3, 1991.

[16] As defense counsel observes, Koon and Powell have already endured multiple adversarial proceedings, as they were prosecuted twice, in successive state and federal trials, for the same underlying conduct. The burden these successive trials imposed on Koon and Powell, while undoubtedly substantial, did not flow from their criminal convictions, and is therefore not the sort of "additional punishment" contemplated in *Aguilar*.

additional proceedings, the loss of employment[17] and tenure, prospective disqualification from the field of law enforcement, and the anguish and disgrace these deprivations entail, will constitute substantial punishment in addition to any court-imposed sentence. In short, because Koon and Powell are police officers, certain unique burdens flow from their convictions.[18]

Additional punishment will be visited upon defendants Koon and Powell as a result of their vulnerability to prison abuse and the adversarial proceedings and related consequences they will suffer as police officers. Such additional punishment constitutes a mitigating circumstance not adequately considered by the Guidelines.

iii. Absence of Need to Protect the Public

In determining the sentence to be imposed, the Court must consider both the need to reflect the seriousness of the offense, and the need to afford adequate deterrence to criminal conduct. *See* 18 U.S.C. § 3553. In this case, defendants Koon and Powell abused their positions of public trust. The offenses of

---

[17] The plurality and the dissent in *Aguilar* apparently agree that loss of position, by itself, would not justify a departure. *See* 994 F.2d at 624-25 & 645.

[18] The specific factors warranting departure in *Aguilar* were, of course, peculiar to Judge Aguilar's circumstance. The Ninth Circuit considered the additional punishment Judge Aguilar would suffer because he is a federal judge, i.e., disbarment and impeachment hearings, removal from a life-tenured position, disqualification from future government appointive positions, and potential forfeiture of his pension rights. *See Aguilar*, 994 F.2d at 644. Presumably, the Ninth Circuit did not intend to create a downward departure available exclusively to convicted Article III judges. The factors considered in the present case, while not identical to those warranting departure in *Aguilar*, are certainly analogous.

which they were convicted are serious,[19] and the Guidelines emphasize the "compelling public interest in deterring and adequately punishing" such conduct. *See* Guidelines § 2H1.4 Commentary, Background.

However, the sentence imposed must also take into account the need to protect the public from further criminal activity by defendants Koon and Powell. *See* 18 U.S.C. § 3553(a)(2)(C). The Court finds, and the government does not dispute, that neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal conduct. There is no reason to impose a sentence that reflects a need to protect the public from these defendants.

Given the seriousness of the offense conduct here, the absence of a potential for recidivism does not, by itself, warrant a departure.[20] However, in attempting to fashion a fair and appropriate sentence for Koon and Powell, the Court has considered, among other factors, that their incarceration is not necessary to protect the public.

---

[19] Indeed, the Guidelines are explicit that "persons who abuse their positions of trust . . . are generally viewed as more culpable." *See* Guidelines § 3B1.3 Commentary, Background.

[20] Additionally, the Guidelines take into account the need for public protection, at least to some extent, by factoring a defendant's criminal history into the determination of an appropriate sentence range. *See* Guidelines, Ch. 5, Pt. A. However, Koon and Powell fall into the lowest criminal history category, along with first-time offenders who may manifest a violent nature or a potential for recidivism. Within Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly unlikely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent "to a degree" not contemplated by the Guidelines. *See* 18 U.S.C. § 1335(b); Guidelines § 5K2.0.

iv. Successive State and Federal Prosecutions

In the California state court case, *People v. Powell, et al.*, Messrs. Koon and Powell were tried by a jury and acquitted[21] of criminal charges for their respective roles in the March 3, 1991 beating of Mr. King. The same underlying conduct gives rise to the convictions on which the Court must now sentence Koon and Powell. As the Court has repeatedly stated, both in its pretrial orders and on the record at trial, the federal prosecution of Messrs. Koon, Powell, Wind and Briseno did not place those defendants in double jeopardy. Under the doctrine of "dual sovereignty," the state and federal governments are free to prosecute violations of their respective laws. *See Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 88 L.Ed.2d 387 (1985). Successive state and federal prosecutions for the same act do not violate the Fifth Amendment.

Nevertheless, a federal conviction following a state acquittal based on the same underlying conduct does create an unusual circumstance, and significantly burdens the defendants. The state of California vigorously prosecuted Koon and Powell, and lost. Many disagreed with the outcome, but there has been no showing that a clear miscarriage of justice occurred. While the federal government has certainly not transgressed the defendants' constitutional rights, its indictment of Koon and Powell after verdicts of acquittal by a state court jury raises a specter of unfairness.

In sum, the Court finds that the combined extraordinary circumstances of this case give rise to "mitigating circumstances" that warrant a departure from the Guidelines range. In reaching this conclusion, the Court is mindful that, by creating the Sentencing Commission and adopting the Guidelines, Congress

---

[21] As noted earlier, Powell was acquitted on two of three Counts. The jury was divided as to Count II against Powell.

sought to achieve uniformity in sentencing and intended that departures would be rare. On the other hand, it was not Congress' aim to straitjacket the sentencing court. *See Lara*, 905 F.2d at 604. The legislative history is explicit on this point, stating that:

> [t]he Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

See Lara, 905 F.2d at 604 (citing S. Rep. No. 225, 98th Cong., 2d Sess. 52, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3235 (Legislative History)).

The Court's decision to depart from the Guidelines in this case is the result of a considered effort to assess the unusual circumstances of the underlying conduct, with the aim of fashioning fair and appropriate sentences for Mr. Koon and Mr. Powell as individuals.

v. Extent of the Departure

The Court finds that the convergence of extraordinary factors in this case warrants a downward departure of 8 levels, resulting in a final offense level of 19. The downward departure is appropriate for each defendant, Koon and Powell.

The Court does not have limitless discretion in determining an appropriate departure, but is guided by the judgments of Congress and the Sentencing Commission. *United States v. Lira-Barraza*, 941 F.2d 745, 748 (9th Cir. 1991). Where it finds a departure from the prescribed Guidelines range is warranted, the Court must provide a reasoned, detailed explanation of the extent of its departure. *See* 18 U.S.C.

§ 3553(c)(2); *Lira-Barraza*, 941 F.2d at 748. The explanation must be "founded on the structure, standards and policies of the Act and Guidelines." *Id.* at 751.

In determining the sentence to be imposed, the Court must not create unwarranted disparities among defendants with similar records who are guilty of similar conduct. *See* 18 U.S.C. § 1335(a)(6). Defendants Koon and Powell are sentenced under the Guideline sections applicable to all government officers who abuse their positions of trust by assaulting, or permitting to be assaulted, an individual in official custody, in violation of that individuals' constitutional rights. The conduct of Koon and Powell is dissimilar to the conduct of others who might be sentenced under the same Guideline sections, in that King's wrongful conduct substantially contributed to provoking the offense behavior. Based on this distinction, expressly recognized by the Guidelines as a proper basis for departure, the Court reduces the defendants' total offense level by 5 points.

In determining that a 5-level reduction is appropriate, the Court has relied on the factors set forth at Guidelines Section 5K2.10,[22] the overall standards and policies of the Guidelines, and its own discretion in attempting to fashion a fair sentence. The policy of the Guidelines expressly contemplates a downward departure where a victim's wrongful conduct removes the offense from the heartland of typical cases, *see* Guidelines Ch. 1, Pt. A, § 4(b) and § 5K2.10, but the appropriate extent of departure is left to the Court's discretion, *see* Guidelines § 5K2.0 and Ch. 1, Pt. A, § 4(b) (departures based on the factors listed in Chapter 5, Part K remain unguided). Nevertheless, *Lira-Barraza* instructs the Court to consider the structure, as well as the policy of the Guidelines, in deciding how far to depart. 941 F.2d at 751.

---

[22] The relevant § 5K2.10 factors and their application to this case are discussed earlier, in explaining the grounds for departure.

As a preliminary matter, the Court observes that *Lira-Barraza* and its progeny place the district courts in an untenable position, by requiring on one hand that a departure be based on factors not adequately considered by the Guidelines, and on the other hand that the Court find some analogy in the Guidelines to justify the extent of departure. In any event, the Court has attempted to follow *Lira-Barraza's* directive, and has reviewed the Guidelines for an analogy which might offer some guidance.

No helpful analogy was found, since no Guideline section provides a downward adjustment based on a victim's wrongful conduct that contributes to the offense, or any similar factor. In fact, very few Guideline sections provide for downward adjustments at all. Rather, the Guidelines generally specify floor offense levels, which are adjusted upward based on specific offense characteristics. Given the wide range of factors requiring upward adjustments, the extent of an upward departure may be more readily explained by analogy to the Guidelines. The few Guidelines sections that set forth specific grounds for downward adjustment are inapposite to this case.[23]

---

[23] For example, the Guidelines provide a downward adjustment for certain crimes if the offense was committed other than for profit. *See, e.g.*, Guidelines Section § 2L2.3 (Trafficking in a United States Passport); § 2L1.1 (Smuggling and Transporting, or Harboring an Unlawful Alien). Similarly, under the guideline applicable to transportation for the purpose of prostitution, the Commission recommends an 8-level downward departure if the offense was not committed for profit and did not involve physical force or coercion. *Id.* § 2G1.1, Commentary, Application Note 1. Under the guideline for threatening communications, a 4-level downward adjustment applies where the defendant's conduct involved a specific instance evidencing little or no deliberation. A defendant who is an accessory after the fact is assigned an offense level 6 points lower than the underlying offense level. *Id.* § 2X3.1(a). None of these Guideline Sections or grounds for downward adjustment is analogous to the present case.

Based on a convergence of three additional factors, the Court finds another mitigating circumstance which warrants a 3-level departure. The first factor in the convergence is the "additional punishment" to which defendants Koon and Powell will be subjected. The clear policy of the Guidelines is that similar defendants convicted of similar offenses should receive like sentences. Because the additional punishment resulting from the defendants' vulnerability to prison abuse, exposure to multiple adversarial proceedings, and status as police officers will increase the severity of any sentence imposed, the Court may reduce the sentence to account for these factors without creating an unwarranted disparity.

The absence of a need to protect the public from these defendants, together with the unusual circumstance of their indictment after the state court verdicts are the second and third factors in the convergence. These factors distinguish Koon and Powell from other defendants who might be convicted of similar conduct. Their sentence should reflect the distinction. In its discretion, the Court finds this complex of three factors justifies a 3-level departure.[24]

Thus, the final offense level for each defendant after downward departure is 19. An offense level of 19 with a Criminal History Category I results in a prescribed Guideline

---

[24] As before, the Court is unable to articulate an analogy to the "structure" of the Guidelines, and has instead relied on the policies expressed therein. The Commission intended that a departure based on "additional punishment" or any other factor not mentioned in the Guidelines would remain unguided and left to the courts' discretion. *See* Guidelines Ch. 1, Pt. A, § 4(b). The requirement that departures be guided by analogy to other guidelines provisions seeks to ensure that the objectives of uniformity and proportionality are served. *See United States* v. *Streit*, 962 F.2d 894, 902 (1992). The Court has been mindful of those objectives in determining the extent of departure.

sentencing range of 30 to 37 months. *See* Guidelines, Ch. 5, Pt. A.

E. Appropriate Sentence Within Guideline Range

Having departed downward to offense level 19, the Court sentences defendants Koon and Powell at the low end of the prescribed Guideline range to a term of 30 months. In reaching this decision, the Court has considered the Pre-Sentence Reports and numerous letters written on behalf of both defendants Koon and Powell. Based on their strong family and community ties and distinguished records of public service, the Court sentences each defendants at the low end of the prescribed Guidelines range to a term of 30 months.

F. Supervised Release

Pursuant to Guidelines Section 5D1.1, the Court must order a term of supervised release when a sentence of imprisonment of more than one year is imposed, or when required by statute. *See* Guidelines § 5D1.1(a).

Defendants Koon and Powell were convicted of violation of 18 U.S.C. § 242 resulting in bodily injury, a Class C felony. *See* 118 U.S.C. § 3559. Since Section 242 does not specifically require a term of supervised release, the length of the term is governed by Guidelines Section 5D1.2(b). Conviction of a Class C felony results in a supervised release term of at least two years but not more than three years. *See* Guidelines § 5D1.2(b)(2).

The Probation Officer recommends a term of two years. Also, the Court has considered the factors set forth at 18 U.S.C. §§ 3553(a) & 3583(c), and finds that two years supervised release is reasonable and appropriate for both defendants Koon and Powell.

G. Restitution, Fines, and Costs of Confinement

i. Restitution

The Court, when sentencing a defendant convicted of an offense under Title 18, may order in addition to any other penalty authorized by law that the defendant make restitution to any victim of the offense. 18 U.S.C. § 3663(a)(1). If a defendant is sentenced to a term of supervised release, then any restitution ordered shall be a condition of such supervised release. 18 U.S.C. § 3663(g).

In determining whether to impose an order of restitution, the Court must consider the amount of loss sustained by the victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and his dependents, and such other factors as it deems appropriate. 18 U.S.C. § 3664(a). The Court's authority to deny restitution is limited. *See* Guidelines § 5E1.1, Commentary. If the Court does not order restitution, it must state its reason for doing so. 18 U.S.C. § 3553(c); *see also* Guidelines § 5E1.1, Commentary.

Restitution is claimed in the amount of $189,494.31 for both Mr. Koon and Mr. Powell. *See* Koon Pre-Sentence Report, para. 114; Powell Pre-Sentence Report, para. 134. Said claim is unsubstantiated and is best left for the pending civil action. Moreover, neither defendant is able, or is likely to become able to pay restitution. *See* Koon Pre-Sentence Report, paras. 119-22, 132; Powell Pre-Sentence Report, paras. 100-02, 112. An order to pay restitution would place an undue burden on Mr. Koon's dependents. For these reasons, restitution will not be ordered.

ii. Fines

Under the Guidelines, the Court is required to impose a fine in all cases, except where the defendant establishes that he is unable to pay and is unlikely to become able to pay any fine. *See* Guidelines § 5E1.2. The Fine Table at Guidelines Section

5E1.2(c)(3) indicates the range of sanctions corresponding to the defendant's offense level. In addition to the fine imposed pursuant to Section 5E1.2(c), the Court must impose an additional fine at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. *See* Guidelines § 5E1.2(i).

However, the Court may impose a lesser fine or waive all fines, including costs of confinement, where the defendant establishes (i) that he is not able to pay and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine; or (ii) that imposition of a fine would unduly burden the defendant's dependents. *See* Guidelines § 5E1.2(f) & (i).

The Pre-Sentence Report indicates that Koon's assets are essentially exhausted. He has five dependent children who will be unduly burdened if a fine is imposed. Powell is likewise unable to pay a fine, and unlikely to become able to pay. Accordingly, all fines are waived, including the cost of imprisonment and supervision.

iii. Victims of Crime Act of 1984

Pursuant to the Victims of Crime Act of 1984, the Court must impose a special assessment of $50 on any individual convicted of a felony against the United States. *See* Guidelines § 5E1.3. The Act does not authorize the court to waive imposition of the assessment. *See* Guidelines § 5E1.3, Commentary. Each defendant is therefore ordered to pay a $50 special assessment.

The Clerk is ordered to prepare judgment and commitment orders consistent with the Court's findings and orders expressed herein, and with such other orders the Court may articulate during the sentencing hearing.

IT IS SO ORDERED.

Dated: August 4, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO.
	)	CR 92 686 JGD
Plaintiff,	)	ORDER DENYING
	)	DEFENDANTS'
v.	)	MOTIONS FOR
	)	JUDGMENT OF
STACEY C. KOON,	)	ACQUITTAL AND
LAURENCE M. POWELL,	)	NEW TRIAL
TIMOTHY E. WIND, and	)	
THEODORE J. BRISENO,	)	
	)	
Defendants.	)	
	)	
	)	

On May 6, 1993, defendant Stacey C. Koon filed a Motion for Judgment of Acquittal Notwithstanding the Verdict Pursuant to Federal Rule 29(c) or in the Alternative a Motion for New Trial Pursuant to Federal Rule of Criminal Procedure 33. The same day, defendant Laurence M. Powell filed his Motion for New Trial and Request for Hearing Thereon. On May 28, 1993, Mr. Koon joined in Mr. Powell's motion for new trial. On June 24, 1993, the government filed its Response to Defendant Koon's and Defendant Powell's Motions for Judgment of Acquittal and New Trial, along with a separate Consolidated Response in Opposition to Defendant Koon's and Defendant Powell's Motion for New Trial Based on Kastigar Issues. On July 14, 1993,[1] Mr. Powell filed his Reply to Government's

[1] On May 13, 1993, the Court ordered the government to respond to the new trial motions on or before June 14, 1993. The defendants were ordered to reply to those responses, if at all, by July 5, 1993.

Opposition to Defendant Powell's Motion for New Trial. On August 4, 1993, the defendants' motions for new trial came before the Court for argument.

The Court has reviewed and considered the parties' papers and the oral arguments of counsel. Based on this review, the Court HEREBY DENIES Mr. Koon's motion for judgment of acquittal or in the alternative for new trial, and DENIES Mr. Powell's motion for new trial.[2]

FACTS

On August 4, 1992, four Los Angeles Police Officers, Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno, were indicted by the United States in a Two-Count Indictment. The Indictment charges in Count One that defendants Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno violated Title 18, United States Code, Section 2, and Title 18, United States Code, Section 242, and aided and abetted each other. The Government charges that while acting under color of the laws of the state of California, said officers willfully struck with batons, kicked, and stomped Rodney Glen King, resulting in bodily injury to him and, thereby, willfully deprived him of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be secure in his person and free from the intentional use of unreasonable force by one making an arrest under color of law. The aiding and abetting count was stated in Count One of the Indictment, but at trial was treated as a separate count and was submitted to the jury as such.

Count Two of the Indictment alleges violation of Title 18, United States Code, Section 242, and is directed against Stacey

[2]The government argues that Mr. Koon's Joinder in Defendant Powell's Motion for New Trial is ineffective since it was untimely filed after May 6, 1993. In any event, the reasons set forth herein for denying Mr. Powell's new trial motion would defeat that motion with respect to Mr. Koon as well.

C. Koon alone. He is charged with willfully permitting the other officers in his presence, and under his supervision, to unlawfully strike with batons, kick, and stomp Rodney Glen King and with the willful failure to prevent the unlawful assault by said officers, all in violation of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody.

The case was tried to a jury commencing February 25, 1993. The jury reached its verdicts on April 16, 1993, and the verdicts were handed up on April 17, 1993.

By said verdicts the jury found that none of the defendants was guilty of aiding and abetting, that Officer Briseno was not guilty of the charges alleged in Count One and was acquitted, that Officer Wind was not guilty of the charges alleged in Count One and was acquitted, that Officer Powell was guilty of the charges other than aiding and abetting alleged in Count One, and that Sergeant Koon was guilty of the charges alleged in Count Two.

On April 27, 1992, the Court granted defendants Koon and Powell's request for an extension of time to file Rule 33 motions for new trial, and ordered that such motions be filed on or before May 7, 1993.

DISCUSSION

Mr. Koon seeks a judgment of acquittal pursuant to Fed. R. Crim. Pro. Rule 29(c), arguing that the evidence at trial was insufficient to sustain a verdict of guilt. Alternatively, Mr. Koon request[s] a new trial pursuant to Fed. Crim. Pro. Rule 33 on the grounds that: (l) the evidence at trial was insufficient to establish the intent element of the charged offense; (2) the Court improperly restricted the scope of expert testimony; (3) the Court failed to properly instruct the jury on Fourteenth Amendment issues; (4) the Court erroneously admitted into evidence Mr. Briseno's state court testimony, in violation of Mr. Koon's Fifth Amendment rights pursuant to *Kastigar v. United*

States, 406 U.S 441 (1972); and (5) the government offered and relied on Mr. Briseno's state court testimony despite a belief that said testimony was perjurious, in violation of Mr. Koon's due process rights.

Mr. Powell seeks a new trial on the grounds that: (l) the government's introduction of Mr. Briseno's state court testimony was improper under the *Kastigar* doctrine; (2) the Court improperly permitted the government to introduce Mr. Briseno's unimpeached state court testimony after the government stated in writing that said testimony was perjured or false; (3) Mr. Powell was denied his Sixth Amendment confrontation right, as he did not have the same "meaningful" opportunity to cross-examine Mr. Briseno at the state court trial that he would have enjoyed had Briseno testified in this Court; (4) Mr. Briseno's state court testimony was improperly introduced as rebuttal evidence as to Mr. Powell; and (5) the government's closing argument to the jury was improper and effectively eliminated from the jury's consideration an element of the charged offense.

The arguments raised by Messrs. Koon and Powell overlap to some extent. The Court responds to each issue raised by the defendants, addressing Koon's and Powell's motions together where appropriate.

* * * *

C. Mr. Koon's Motion for New Trial Based On Improper Jury Instructions

Mr. Koon seeks a new trial on the theory that the Court failed to instruct the jury pursuant to the standard enunciated in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). Because he was indicted under the Fourteenth Amendment and was specifically excluded from the Fourth Amendment violation charge, Mr. Koon contends that the Court erroneously instructed the jury under Fourth Amendment standards.

In a recent ruling, the Ninth Circuit clearly reiterated that "'*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . .'" *United States v. Reece et al.*, 93 Daily Journal D.A.R. 9617, 9622 (9th Cir., July 28, 1993) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). By so holding, the Ninth Circuit "expressly disapproved 'indiscriminate' application of the four-part test established by Judge Friendly in *Johnson v. Glick* to cases involving claims of excessive force." *Id.* (citation omitted).

In light of *Reece*, it is clear that the Court properly rejected the instructions proffered by Mr. Koon, and instructed the jury pursuant to *Graham's* objective reasonableness standard. The jury instructions were proper, and Mr. Koon is not entitled to a new trial on this basis.

D. Messrs. Koon and Powell's Motions for New Trial Based on Kastigar Issues

Both Messrs. Koon and Powell argue that the admission of Mr. Briseno's videotaped prior testimony violated their Fifth Amendment rights pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972).

This issue was debated, considered and decided by the Court during the trial. On or about April 5, 1993, Messrs. Koon, Powell, and Wind objected to the introduction of Mr. Briseno's videotaped prior testimony, arguing that Briseno had been exposed to their compelled IAD statements prior to testifying in the state court proceedings. It was undisputed that the IAD statements constitute compelled testimony subject to immunity under *Kastigar* and its progeny. 406 U.S. at 460. Accordingly, on April 5 and April 6, 1993, the Court conducted a *Kastigar* hearing. In a detailed narrative Order, the Court explained its finding that the government had sustained its burden and had proved that Mr. Briseno's testimony was not tainted by the other defendants' compelled statements. *See*

Order Re: "Kastigar" Hearing on Briseno's State Court Testimony, filed April 13, 1993.

In their motions for new trial, Mr. Koon and Mr. Powell do not cite new facts or legal authority that the Court failed to consider in its prior ruling on the *Kastigar* issue. The defendants simply refute the Court's finding that the government carried its burden.

For the reasons set forth in the Court's April 13, 1993 Order, the Court stands by its earlier finding that the government demonstrated by a preponderance of the evidence that Mr. Briseno's videotaped state court testimony was derived from sources wholly independent of the defendants' compelled statements, and was not shaped, altered, or affected by them.

As such, the government's introduction of Mr. Briseno's former testimony did not violate the defendants' Fifth Amendment rights under *Kastigar*, and neither Mr. Koon nor Mr. Powell is entitled to a new trial on this basis.

* * * *

CONCLUSION

For all of these reasons, the Court HEREBY DENIES Mr. Koon's motion for judgment of acquittal notwithstanding the verdict, DENIES Mr. Koon's motion for new trial, and DENIES Mr. Powell's motion for new trial.

IT IS SO ORDERED.

Dated: August 6, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. CR 92 686 JGD
Plaintiff,	)	ORDER GRANTING DEFENDANT KOON'S MOTION FOR EVIDENTIARY HEARING TO DETERMINE VIOLATION OF SELF-INCRIMINATION RIGHTS AND REQUEST FOR KASTIGAR HEARING
v.	)	
STACEY C. KOON, LAURENCE M. POWELL, TIMOTHY E. WIND, and THEODORE J. BRISENO,	)	
Defendants.	)	

On November 12, 1992, defendant Stacey C. Koon's Motion for Evidentiary Hearing to Determine Violation of Self-incrimination Rights and Request for *Kastigar* Hearing came before the Court for argument. The Court has reviewed and considered the parties' papers and the oral arguments of counsel. Based upon this review, the Court HEREBY GRANTS defendant Koon's motion.

PROCEDURAL BACKGROUND

On August 4, 1992, a federal grand jury returned a two count indictment against Defendants, Los Angeles Police Department (LAPD) officers Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno. This action arises from what is popularly known as the "Rodney King indicent" and has received national and international attention. Defendants herein were tried and acquitted of all but one of the charges arising from the same incident in the state court action, ***People v. Powell, et al.***, Ventura County Superior Court, No.

BA035498.[1] Widespread civil unrest in Los Angeles and other parts of the country followed said acquittals.

Count One of the federal indictment charges that Defendants Powell, Wind and Briseno, while acting under color of state law, aiding and abetting each other, used unnecessary force in the arrest of Rodney King on March 3, 1991, thereby depriving King of his constitutional rights in violation of 18 U.S.C. §§ 2 & 242. Count Two of the indictment charges that Defendant Koon, the sergeant in charge at the scene of the beating, willfully permitted the other defendants to beat King in his presence and under his supervision, in violation of 18 U.S.C. § 242.

18 U.S.C. § 2, under which Defendants Powell, Wind and Briseno are charged, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principle.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Additionally, 18 U.S.C. § 242, under which all defendants are charged, provides in pertinent part as follows:

> Whoever, under color of any law . . . willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any [constitutional rights]. . . by reason of his color, or race, shall be fined not more than $1000 or imprisoned not more than one year, or both;

[1] All defendants except Powell were acquitted on all charges. The jury was unable to reach a verdict on one count against Powell, and as to that count a mistrial was declared.

> and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both.

The elements of the offense are: (1) the defendant must act under color of law and (2) willfully subject (3) an inhabitant to (4) a deprivation of constitutional rights (5) on account of the inhabitant's color of race. The willfulness or intent required must be directed at the deprivation of constitutional rights. That is, the defendant must not only intend his acts, but he must intend to deprive the inhabitant of his constitutional rights.

The indictment charges that Defendants intentionally deprived King of his constitutional right to be free from intentional use of unreasonable force. Thus, additional elements the government must prove at trial are whether Defendants' conduct constituted a use of excessive force, and whether such use was intentional.

THE RELIEF SOUGHT BY THE PRESENT MOTION

By the present motion, defendant Koon seeks an evidentiary hearing to require the government to prove that all evidence it proposes to use at trial is derived from legitimate sources, and not from Koon's immunized statement. Defendant Koon was at all relevant times herein, and is at the present time, an LAPD police officer. A criminal and administrative investigation of the matters underlying this case was conducted by investigators at the LAPD, defendant Koon's employer. As such, defendant Koon contends that he is entitled to certain procedural protections which are not afforded other individuals accused of criminal conduct.

On March 14, 1991 and on March 18, 1991, representatives of the LAPD Internal Affairs Division ("IAD") interviewed defendant Koon. At the interview, Detective Tzimeas of the IAD read defendant Koon his *Miranda* rights. Koon refused to waive his rights and declined to speak to the IAD.

Thereafter, Detective Tzimeas read defendant Koon his administrative rights and informed him that silence in the face of an interview request could lead to administrative discipline and discharge. Detective Tzimeas indicated that any statement made under compulsion of the threat of such discipline could not be used against Koon in a subsequent criminal proceeding. Under these circumstances, Mr. Koon agreed to answer questions, and was interviewed extensively by IAD officers. Following the interview, Detective Tzimeas asked defendant Koon whether he wished to sign the statements regarding his advisement of rights, and Koon declined.

Notwithstanding the assurances given to Koon that statements made in the IAD interview were immunized, counsel for defendant Koon later discovered that the government has in its possession a copy of the IAD interview transcript (the "IAD statements"). On or about August 27, 1992, counsel for defendant Koon received a letter from the government prosecutors indicating that they had rough transcripts of the IAD statements, but that "the government attorneys responsible for the investigation and prosecution of this case have not read, reviewed, or listened to those statements." *See* Salzman Declaration, para. 3. Accompanying this letter were 6,770 pages of discovery materials. The IAD statements were included in these materials at pages 4841 through 5106.

Based upon these events, Mr. Koon now moves the Court to conduct a hearing to determine whether any of the government attorneys and investigators assigned to try this case have been exposed to and tainted by Koon's IAD statements. The government argues that a *Kastigar* hearing is unnecessary as all of the government attorneys and investigators responsible for this case have been carefully and deliberately shielded from exposure to Mr. Koon's IAD statements.

DISCUSSION

The issue to be decided is whether defendant Koon is entitled to an evidentiary hearing to determine whether any of

the government's evidence to be presented at trial is derived from defendant Koon's immunized IAD statement.

A. The Standard

Pursuant to the Fifth Amendment of the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Because the privilege against self-incrimination is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple, expedient of compelling it from his own mouth." *See Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

In accordance with this fundamental principle, the protection against coerced statements extends to public employees who, during the course of an administrative investigation, must choose either to incriminate themselves or to forfeit their jobs. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Thus where a police officer, after invoking his Fifth Amendment rights, makes a statement under threat of removal from office, the statement is considered the product of compulsion and may not be admitted as evidence or used as an "investigative lead" against the officer in any criminal proceeding. *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1664-65, 32 L.Ed.2d 212 (1972); *Garrity*, 385 U.S. at 497, 87 S.Ct. at 618-19.

Once a defendant has demonstrated that his testimony is subject to such immunity, the government has the burden to show that the evidence it intends to use in a subsequent criminal prosecution is derived from a source wholly independent of the compelled testimony. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), *cert. denied*, 469 U.S. 835 (1984). The government cannot meet its burden by merely negating the taint, but rather must prove the existence of an independent source by a

preponderance of the evidence. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988).

"A trial court must normally hold a hearing (a '*Kastigar* hearing') for the purpose of allowing the government to demonstrate that it obtained all the evidence it proposes to use from sources independent of the compelled testimony." *See United States v. North*, 910 F.2d 843 (D.C. Cir. 1990). Where required, a *Kastigar* hearing may be held pre-trial, post-trial, mid-trial as evidence is offered, or by some combination of these methods. *Id.*

Within the content of a *Kastigar* hearing, the Ninth Circuit has permitted the government to meet its burden of proof as to the existence of independent, prior sources through affidavits. *See Rogers*, 722 F.2d at 557; *see also Crowson*, 828 F.2d 1427. Other circuits have gone farther and held that a *Kastigar* hearing is unnecessary where the government's documentary evidence conclusively demonstrates the existence of an independent source. *See United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Biaggi*, 909 F.2d 662, 689-90 (2d Cir.) (no hearing necessary where, at the conclusion of the trial, transcripts of the immunized testimony and the trial record demonstrated the existence of an independent source), *cert. denied*, 111 S.Ct. 1102, 113 L.Ed.2d 213 (1991).

B. Analysis

In this case, it is undisputed that before defendant Koon made statements to the IAD, he invoked his Fifth Amendment rights and was warned that he would suffer disciplinary action if he failed to answer questions pursuant to the ongoing administrative investigation. Mr. Koon was also told that his statements could not be used against him in subsequent criminal proceedings. The government concedes these facts, as well as the conclusion that Koon's IAD statements constitute compelled testimony subject to immunity under *Kastigar* and its progeny. 406 U.S. at 460, 92 S.Ct. at 1665.

As such, the government has the burden to prove that all evidence it proposes to present at trial derives from a source wholly independent of the compelled statements. *Id.* If a *Kastigar* hearing is held, the government may meet its burden through affidavits. *Rogers*, 722 F.2d at 557.

However, in opposing the present motion, the government argues that sworn affidavits may be submitted in lieu of a *Kastigar* hearing. Thus, the government urges the Court to find that it has met its burden to prove the existence of an independent source for all its evidence by submitting declaration testimony to that effect.

According to the sworn affidavits submitted by the government, police misconduct cases commonly involve compelled statements made in the course of an investigation by a local police department's internal affairs division. *See* Declaration of Karla Dobinski, para. 4. For this reason, an pursuant to the doctrine established in *Garrity*, 385 U.S. at 497, 87 S.Ct. at 618-19, the Criminal Section of the Civil Rights Division of the Department of Justice has instituted standard internal procedures for segregating immunized statements from the individuals responsible for prosecuting the case. *Id.*, para. 5. Under these standard procedures, attorneys and/or paralegals (the "*Garrity* reviewers") review the evidence, segregating and transferring to a separate file the compelled statements and any information derived therefrom. *Id.*, para. 6. The *Garrity* reviewers may not participate in discussions with the prosecution team concerning either the content of the compelled statements or the strategy for investigation and trial. *Id.*, para. 7.

According to the attorney who headed the *Garrity* team in this case, these standard procedures were followed with respect to defendant Koon's compelled statements. *Id.*, para. 9. The *Garrity* reviewers have conducted a systematic examination of all government materials from any source. *Id.*, para. 10. "Only evidence or materials which [they] determined to be from a source independent of the compelled statements was disseminated to the prosecution team." *Id.* Copies of the compelled statements, evidence which revealed the contents of those

statements, or evidence for which the *Garrity* team was unable to identify an independent source was never provided to the prosecution team attorneys or investigators. *Id.* Thus, the exhaustive declaration testimony supplied by the government indicates the existence of an independent source, and expressly denies that individuals involved in prosecution of this case had access to either the compelled statements or evidence derived therefrom.

Additionally, the government has filed with the Court the sworn declaration testimony of Barry F. Kowalski and Steven D. Clymer, the two lead prosecutors in the instant action, and David L. Harris, the FBI agent in charge of the investigation in this case. Consistent with the Criminal Section's standard internal procedures, Kowalski, Clymer, and Harris testify that they "have not seen, read, heard, or used, directly or indirectly, any statements or portions of statements" that defendant Koon gave to the IAD. *See* Kowalski Declaration. para. 3; Clymer Declaration, para. 3; Harris Declaration, para. 7. Each of the declarants has instructed the attorneys, support staff, and special agents under his direction to refrain from seeing, reading, hearing or using such statements. *See* Kowalski Declaration, para. 6; Clymer Declaration, para. 6; Harris Declaration, para. 9. Neither Kowalski nor Clymer has discussed the investigative or trial strategy of this case with the *Garrity* reviewers. *See* Kowalski Declaration, para. 5; Clymer Declaration, para. 5.

In view of the availability of such exhaustive declaration testimony, a *Kastigar* hearing may be unnecessary. The sworn affidavits submitted by the government appear to serve the same fundamental purposes that a *Kastigar* hearing will advance. A government official has sworn that all of the evidence to be presented at trial is derived from a source independent of defendant Koon's compelled testimony. The government has presented to the Court a cogent explanation of the procedures whereby prosecuting attorneys and investigators were shielded form Koon's immunized statements and all evidence derived therefrom.

However, as set forth by the Supreme Court in *Kastigar*, the government's affirmative duty to establish an independent source for its evidence is designed to provide defendant a "very substantial protection." 406 U.S. at 460-61, 92 S.Ct. at 1664-65. By conducting a hearing, the Court can ensure that such Mr. Koon is afforded such substantial protection, and thereby protect the integrity of this proceeding. *See e.g., United States v. Zielezinski*, 740 F.2d 727, 734 (9th Cir. 1984). Thus, defendant Koon is entitled to a hearing at which he may cross-examine the government's testimony to establish that the command of the Fifth Amendment has been satisfied. *Id.*

CONCLUSION

The government, by filing exhaustive sworn affidavits, has arguably met its burden to prove the existence of an independent source. Nevertheless, to establish beyond doubt that defendant Koon receives the substantial protection afforded him under the Fifth Amendment, the Court HEREBY GRANTS defendant Koon's motion for a *Kastigar* hearing, and sets said hearing for Monday, January 4, 1993 at 3:30 p.m.

IT IS SO ORDERED.

Dated: November 30, 1992

/s/ John G. Davies
Unted States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. CR 92 686 JGD
Plaintiff,	)	ORDER RE: "KASTIGAR" HEARING ON BRISENO'S STATE COURT TESTIMONY
v.	)	
STACEY C. KOON, LAURENCE M. POWELL, TIMOTHY E. WIND, and THEODORE J. BRISENO,	)	
Defendants.	)	

As part of its rebuttal case, the government seeks to introduce videotaped portions of Mr. Briseno's state court testimony. Defendants Koon, Powell, and Wind argue that the introduction of the videotaped former testimony violates their Fifth Amendment rights, since Briseno was exposed to their compelled IAD statements prior to testifying in the state court proceedings. On April 5 and 6, 1993, the Court conducted a *Kastigar* hearing to establish whether the government's introduction of defendant Briseno's former testimony constitutes a prohibited use of the other defendants' compelled IAD statements. The Court has reviewed and considered the defendant's written objections, Mr. Saltzman's declaration testimony, the defendants' compelled IAD statements, the government's annotated transcript of Briseno's state court testimony, and the arguments presented at the *Kastigar* hearing. Based upon this review, the Court HEREBY FINDS that the government has met its burden, and has shown by a

preponderance of the evidence that the videotaped state court testimony it intends to present derives from sources wholly independent of the defendants' compelled IAD statements, and is not shaped, altered, or affected by Briseno's exposure to said compelled statements. *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1655, 32 L.Ed.2d 212 (1972); *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir.), *cert. denied*, 113 S.Ct. 656 (1992); *United States v. North*, 910 F.2d 843, 863-65 ("*North I*"), *modified*, 920 F.2d 940 (D.C. Cir.) ("*North II*"), *cert. denied*, 111 S.Ct. 2235 (1991).

DISCUSSION

A. The Standard

Pursuant to the Fifth Amendment of the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Because the privilege against self-incrimination is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple, expedient of compelling it from his own mouth." *See Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

In accordance with this fundamental principle, the protection against coerced statements extends to public employees who, during the course of an administrative investigation, must choose either to incriminate themselves or to forfeit their jobs. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Thus where a police officer, after invoking his Fifth Amendment rights, makes a statement under threat of removal from office, the statement is considered the product of compulsion and may not be admitted as evidence or used as an "investigative lead" against the officer in any criminal proceeding. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1664-65; *Garrity*, 385 U.S. at 497, 87 S.Ct. at 618-19.

Once a defendant has demonstrated that his testimony is subject to such immunity, the government has the burden to show that the evidence it intends to use in a subsequent criminal prosecution is not tainted, but is derived from a legitimate source wholly independent of the compelled testimony. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *Poindexter*, 951 F.2d at 373. Further, because *Kastigar* prohibits any use of compelled testimony, direct or indirect, a witness's recollection may not be refreshed, nor may his testimony be "shaped, altered, or affected," by exposure to a defendant's compelled testimony. *See Poindexter*, 951 F.2d at 373 (citing *North I*, 910 F.2d at 860-63). The government cannot meet its burden by merely negating the taint; rather, it must affirmatively prove the absence of taint by a preponderance of evidence. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988);.

"A trial court must normally hold a hearing (a '*Kastigar* hearing') for the purpose of allowing the government to demonstrate that it obtained all the evidence it proposes to use from sources independent of the compelled testimony." *See North I*, 910 F.2d at 854. Where required, a *Kastigar* hearing may be held pre-trial, post-trial, mid-trial as evidence is offered, or by some combination of these methods. *Id.*

B. Analysis

It is undisputed that the IAD statements of defendants Koon, Powell, and Wind constitute compelled testimony subject to immunity under *Kastigar* and its progeny. 406 U.S. at 460, 92 S.Ct. at 1665. The parties have stipulated that Mr. Briseno received his co-defendant's compelled IAD statements in a package of *Skelly* materials[1], and that Briseno read the IAD

---

[1] Pursuant to *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774 (1975), an LAPD officer who faces disciplinary proceedings is provided a "*Skelly* package," containing all of the evidence from internal

[Footnote continued on next page]

statements, or summaries thereof, before he testified at the state court proceedings. Thus, the government has the burden to prove by a preponderance of the evidence that Mr. Briseno's state court testimony was neither derived from, nor influenced by, the other defendants' compelled statements. *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *Poindexter*, 951 F.2d at 373.

In support of its position, the government has submitted an annotated transcript of the relevant portions of Mr. Briseno's state court testimony. As demonstrated in this line-by-line treatment, much of Mr. Briseno's former testimony relates to matters not addressed in any of the compelled IAD statements. To the extent that Mr. Briseno's state court testimony does not implicate the compelled statements, the government has shown by a preponderance of the evidence that it is untainted.

With regard to the portions of Briseno's state court testimony which overlap with the subject matter of his co-defendants' IAD statements, the annotated transcript indicates that any information contained in the IAD statements was also available through independent sources, including the George Holliday videotape, and the state trial testimony of Melanie Singer, Timothy Singer, Rolando Solano, Stacey Koon, and Laurence Powell. Mr. Briseno was exposed to all of these sources prior to giving his own testimony at the state trial. Thus, the annotated transcript establishes the existence of independent sources for Briseno's state court testimony.

By itself, however, this showing is insufficient. A prohibited use of compelled testimony occurs if a witness's testimony is in any way "shaped, altered, or affected" by exposure to the compelled testimony. *Poindexter*, 951 F.2d at

---

[Footnote continued from previous page]

investigations of the matter, including the compelled statements of other LAPD officers.

373; *North I*, 910 F.2d at 863. Thus, the government must affirmatively prove that Mr. Briseno's state court testimony was in no way influenced by Briseno's exposure to his co-defendants' compelled statements.

Here, the government's efforts to sustain its burden have met with two obstacles. First, the government did not "can" Mr. Briseno's testimony before his exposure to the compelled IAD statements. *See North II*, 920 F.2d at 943 (recognizing that, where the prosecutor fails to "can" testimony, "it may well be extremely difficult for the prosecutor to sustain its burden"). Second, at the *Kastigar* hearing, Mr. Briseno exercised his Fifth Amendment right and declined to testify regarding his ability during the state trial to segregate the effects of his exposure to the IAD statements. *See Poindexter*, 951 F.2d at 369 ("where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure," prosecution does not meet its burden by pointing to the witness's other untainted statements).

These obstacles, though significant, are not necessarily insurmountable. As the *North II* court expressly stated, it is not a requirement that the testimony of an exposed witness be pre-recorded; rather, such "canning" is one method by which the prosecution may meet its burden. 920 F.2d at 942-43; *see also Poindexter*, 951 F.2d at 376 (declining to adopt suggestion that a pre-recorded statement is the only reliable proof that defendant's compelled testimony is not used against him). The government is not "barred from trying to show in any fashion that a witness' testimony was not influenced by the [compelled testimony]." *North II*, 920 F.2d at 943.

Thus, the Court need not confine the government to any particular method of proof. Here, given the totality of the circumstances, the government has produced a preponderance of evidence that Mr. Briseno's former testimony was not influenced by his exposure to the IAD statements.

First, the government's inability to produce a pre-recorded or "canned" version of Briseno's state court testimony is largely

attributable to Briseno's successful efforts to dodge the IAD. Unlike his three co-defendants, Briseno did not provide a compelled statement during the course of the LAPD internal investigation. He was inexplicably unavailable to give an interview.

Second, Mr. Briseno has independent personal knowledge of the events to which he testified. Had Briseno taken the stand and claimed that he lacked independent recollection of events in which he was personally involved, his claim would have been incredible. *See e.g., Poindexter*, 951 F.2d at 376 (district court would have correctly rejected an assertion that North remembered little or nothing of events in which he participated). The Court recognizes that a showing of personal knowledge does not, by itself, rule out the possibility that Briseno's memory was influenced by the compelled IAD statements. *See Poindexter*, 951 F.2d at 374. But here, Briseno was extensively exposed to the testimony of other witnesses, including defendants Powell and Koon, immediately prior to giving his own testimony at the state trial. Given this contemporaneous exposure to independent sources, as well as Briseno's personal knowledge of the events to which he testified, it is unlikely that Briseno's state court testimony was influenced by summarized IAD statements he received in a *Skelly* package nearly a year earlier[2].

This conclusion is bolstered by the inconsistency between Mr. Briseno's state court testimony and his co-defendants' IAD statements. The mere fact that a witness proffers a rebuttal of compelled testimony does not establish that his testimony is untainted. *See Poindexter*, 951 F.2d at 374. However, upon review of the relevant transcripts, the Court finds unconvincing

---

[2] The date on which Mr. Briseno received and reviewed the *Skelly* materials, which included summarized versions of the co-defendants' IAD statements, is not subject to the parties' stipulation. However, Mr. Koon represents that the *Skelly* materials were provided to Mr. Briseno on April 16, 1991, nearly a year before Briseno testified at the state trial on April 13, 1992. *See* Defendants' Opp. to Admission of Former Testimony, filed April 5, 1993.

the proposition that Briseno's account of the underlying events, as set forth in his state court testimony, was shaped by the inconsistent accounts contained in his co-defendants' IAD statements.

Finally, unlike the witnesses in *North* who were "substantially exposed" to compelled testimony, there is no evidence that Briseno's exposure to his co-defendants' IAD statements went beyond a cursory reading. *Compare North*, 910 F.2d at 863-64 ("many grand jury and trial witnesses were thoroughly soaked in North's immunized testimony"). Of course, even minimal exposure to compelled testimony may result in taint if it influences a witness's memory. However, Briseno's personal recollection, fortified by the exhaustive testimony of other witnesses at the state trial, is unlikely to have been shaped by a brief and remote exposure to the IAD statements of other officers.

Given the totality of the circumstances, the Court finds it more likely than not that Briseno's state court testimony was uninfluenced by his co-defendants' compelled statements, but was based on personal recollection, perhaps refreshed by recent exposure to the state court testimony of other witnesses.

CONCLUSION

For these reasons, the Court HEREBY FINDS that the government has met its burden by a preponderance of the evidence. Accordingly, the government's introduction of videotaped portions of Mr. Briseno's former state court testimony is permissible, and does not constitute a prohibited use of defendants Koon, Powell, and Wind's compelled IAD statements.

IT IS SO ORDERED.

Dated: April 13, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

February 1992 Grand Jury

UNITED STATES OF AMERICA,	)	
	)	
	)	CR 92-686
Plaintiff,	)	
	)	INDICTMENT
v.	)	
	)	[18 U.S.C. § 242:
STACEY C. KOON,	)	Deprivation of Rights
LAURENCE M. POWELL,	)	Under Color of Law;
TIMOTHY E. WIND, and	)	18 U.S.C. § 2; Aiding
THEODORE J. BRISENO,	)	and Abetting]
	)	
Defendants.	)	
	)	

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §§ 2 & 242]

On or about March 3, 1991, in Los Angeles, California, within the Central District of California, defendants LAURENCE M. POWELL, TIMOTHY E. WIND, and THEODORE J. BRISENO, then police officers with the Los Angeles Police Department, while acting under color of the laws of the state of California, aiding and abetting each other, did willfully strike with batons, kick, and stomp Rodney Glen King, an inhabitant of the state of California, resulting in bodily injury to Rodney Glen King, and thereby did willfully deprive Rodney Glen King of the right preserved and protected by the Constitution of the United States not to be deprived of liberty

without due process of law, including the right to be secure in his person and free from the intentional use of unreasonable force by one making an arrest under color of law, all in violation of Title 18, United States Code, Sections 2 and 242.

COUNT TWO

[18 U.S.C. § 242)

On or about March 3, 1991, in Los Angeles, California, within the Central District of California, defendant STACEY C. KOON, then a sergeant with the Los Angeles Police Dekartment, while acting under color of the laws of the State of California, did willfully permit other Los Angeles Police Officers in his presence and under his supervision, namely Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno, unlawfully to strike with batons, kick, and stomp Rodney Glen King, an inhabitant of the State of California, while Rodney Glen King was in the custody of those officers, and did willfully fail to prevent this unlawful assault; resulting in bodily injury to Rodney Glen King, and thereby did willfully deprive Rodney Glen King of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody, all in violation of Title 18, United States Code, Section 242.

A TRUE BILL

_____

Foreperson

LOURDES G. BAIRD
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

BARRY F. KOWALSKI
Deputy Chief
Criminal Section
Civil Rights Division

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. The Court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing

Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) **Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) **Presentence procedure for an order of notice.** Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) **Limited authority to impose a sentence below a statutory minimum.** Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

U.S.S.G. §2A2.2 Aggravated Assault

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **5** levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury in Level	Increase
(A) Bodily Injury	add **2**
(B) Serious Bodily Injury	add **4**
(C) Permanent or Life-Threatening Bodily Injury	add **6**

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or

(E) If the degree of injury in between that specified in subdivisions (B) and (C), add **5** levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

(4) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(b), (c), (f), 114, 115(a), (b)(1), 351(e). For additional statutory provisions(s), see Appendix A (Statutory Index).

1. *"Aggravated assault" means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony.*

2. *Definitions of "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to* §1B1.1 (Application Instructions).

3. *This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1.*

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar conduct. For example, if the assault is upon certain federal officers "while engaged in or on account of ... official duties," the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

§2H1.4. Interference with Civil Rights Under Color of Law

(a) Base Offense Level (Apply the greater):

(1) **10**; or

(2) **6** plus the offense level applicable to any underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. § 242.

1. *"6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.*

2. *Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing

a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). The 6-level increase under subsection (a)2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the

guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guidelines range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guidelines is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the

"heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

Commentary

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to providing the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.